

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1907

No. 105 3d 9.

THE UNITED STATES, APPELLANT,

VS.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,
JOHN A. MURDOCK, AND THOMAS E. EVANS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT.

PRINTED AT WASHINGTON, D. C.

(1907).

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 295.

THE UNITED STATES, APPELLANT,

VS.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,
JOHN A. HURLBURT, AND THOMAS L. EVANS.APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT.

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Citation.

UNITED STATES OF AMERICA,
District of Oregon, ss:

To the United States, greeting:

Whereas The Oregon & California Railroad Company, John A. Hurlburt, and Thomas L. Evans have lately appealed to the United States circuit court of appeals for the ninth circuit from a decree rendered in the circuit court of the United States for the district of Oregon in your favor, of date September 9th, 1895, and have given the security required by law, you are therefore hereby cited and admonished to be and appear before said circuit court of appeals at San Francisco, California, within thirty days from date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this Dec. 30th, 1895.

GILBERT, *Circuit Judge.*

(Endorsed:) United States, district of Oregon, county of Multnomah, ss. Due and legal service of the within citation is hereby admitted to have been made upon the United States and upon me, within said county and district, this 30th day of December, 1895. Daniel R. Murphy,

United States district attorney and solicitor for complainant.
 2 U. S. circuit court, district of Oregon. The United States, complainant, vs. The Oregon & California Railroad Company, John A. Hurlburt, and Thomas L. Evans, defendants. Citation on appeal. Filed Dec. 30, 1895. J. A. Slader, clerk.

In the circuit court of the United States for the district of Oregon.
 October term, 1892.

Be it remembered that on the 3d day of February, 1893, there was duly filed in the circuit court of the United States for the district of Oregon a bill of complaint in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES OF AMERICA, COMPLAINANT,

vs.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, John A. Hurlburt, and Thomas L. Evans,
 defendants.

In equity.

Bill of complaint.

To the Honorable Judges of the Circuit Court for the District of Oregon,
 Sitting in Equity:

3 The United States of America, by W. H. H. Miller, its Attorney-General, brings this its bill of complaint against The Oregon and California Railroad Company, a corporation organized under

and by virtue of the laws of the State of Oregon and a citizen of said State and district, John A. Hurlburt, and Thomas L. Evans, citizens of the United States and of the State of Oregon, and residents of the State of Oregon, and complaining, says:

Par. 1. That the Congress of the United States, by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, created the corporation of The Northern Pacific Railroad Company and authorized it to build a railroad from a point on Lake Superior in Wisconsin or Minnesota westerly by the most eligible route north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch via the Columbia River, to a point at or near Portland, in the State of Oregon, and granted to said company every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company might adopt, through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passed through any State, and whenever on the line thereof the United States had full title, not reserved, sold, or granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said

4 time any of said sections or parts of sections should have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands should be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

2nd par. And your orator further shows that by a joint resolution entitled "A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage and for other purposes," approved May 31, 1870, the Congress of the United States authorized the said Northern Pacific Railroad Company to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and your orator avers that said general direction and locality designated in the said resolution as the main line between the junction point and Portland is the same general direction and locality designated as the branch in said act of incorporation.

3rd par. Your orator would further show that on March 6, 1865, the then Secretary of the Interior received from Josiah Perham, the then president of the said Northern Pacific Railroad, a certain letter of that date, a copy of which letter is filed herewith and made a part hereof, marked "Exhibit B."

5 That accompanying said letter was the map referred to therein, a copy of which is herewith filed and made part hereof, marked "Exhibit C."

That on March 9, 1865, the then Secretary of the Interior transmitted said map to the then Commissioner of the General Land Office, with letter, a copy of which is filed herewith and made part hereof, marked "Exhibit D."

That on June 22, 1865, the then Commissioner of the General Land Office returned said map to said Secretary of the Interior, with a letter, a copy of which, with its endorsements, is filed herewith and made part hereof, marked "Exhibit E."

That on April 27, 1867, Mr. E. F. Johnson, the chief engineer of the said Northern Pacific Railroad Company, addressed a letter to the Commissioner of the General Land Office, accompanied by a certain map therein referred to, which letter was replied to on May 8, 1867, by said Commissioner, a copy of which letter, map, and reply are attached together, and filed herewith and made part hereof, and marked as one "Exhibit F."

That on February 18, 1870, Mr. H. D. Cooke, on behalf of the said Northern Pacific Railroad Company, sent to the Secretary of the Interior a certain letter of J. Gregory Smith, the president of said railroad company, dated February 17, 1870, a copy of which letter is filed herewith and made part hereof, marked "Exhibit G."

That on February 21, 1870, the Secretary of the Interior replied to said letter, a copy of his reply being filed herewith, made part hereof, and marked "Exhibit H."

6 That on August 4, 1870, two maps of general route were presented to the then Secretary of the Interior by said Edwin F. Johnson, chief engineer of said Northern Pacific Railroad Company, a copy of which maps and the letter of the Secretary of the Interior, directing a withdrawal thereunder, attached together, is filed herewith, made part hereof, and marked "Exhibit A." Accompanying said maps were certain certificates of the officers of said railroad company, copies of which are filed herewith and made part hereof, and marked "Exhibit J," and the letter of the Secretary of the Interior, dated August 13, 1870, to J. G. Smith, a copy of which is filed herewith, made part hereof, and marked "Exhibit K." And orator avers that said last-mentioned maps designated, among other things, a route following the Columbia River from Wallula, Washington Territory, to a point on the north side of said river opposite Portland, in the State of Oregon, and the Secretary of the Interior did, on the 13th day of August, 1870, in due form, accept said map and directed the withdrawal of lands opposite the line in question, and the following described lands situate in the State of Oregon were odd numbered sections or parts of odd numbered sections of public lands not mineral within the place limits of said proposed line of railroad as designated by said map and within the limits of the withdrawal ordered: Lot number five (5), section thirty-five (35), township one (1) south, range one (1) east; lot number two (2), section three (3), township two (2) south, range one (1) east; lots number one (1) and eight (8), section nine (9), township two (2) south, range one (1) east; lots number one (1), seven (7), eight (8), and nine (9), section fifteen (15), township three (3) south, range one (1) east; lot number one (1), section twenty-five (25), township three (3) south, range one (1) east; lots one (1), two (2), three (3), and four (4), section thirty-five (35), township three (3) south, range one (1) east; southeast quarter section one (1),

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township four (4) south, range one (1) east; northeast quarter southwest quarter section eleven (11), township four south, range one (1) east; west half northeast quarter section thirteen (13), township four (4) south, range one (1) east; north half southeast quarter section twenty-three (23), township four (4) south, range one (1) east; lot number one (1), section twenty-seven (27), township four (4) south, range one (1) east; northwest quarter section one (1), township five (5) south, range one (1) east; west half southeast quarter section nine (9), township five (5) south, range one (1) east; east half northwest quarter and east half southwest quarter section thirteen (13), township five (5) south, range one (1) east; northeast quarter section one (1), township six (6) south, range one (1) east; lots number eight (8) and nine (9), section eleven (11), township six (6) south, range one (1) east; west half section thirteen (13), township six (6) south, range one (1) east; west half northeast quarter and west half southeast quarter section thirteen (13), township six (6) south, range one (1) east; east half northeast quarter and lots one (1) and two (2), section twenty-three (23), township six (6) south, range one (1) east; southeast quarter southeast quarter section nine (9), township one (1) south, range two (2) east; lot number two (2), section eleven (11), township one (1) south, range two (2) east; northeast quarter northeast quarter section fifteen (15), township one (1) south, range two (2) east; south half and lots number one (1), two (2), three (3), and four (4), section twenty-three (23), township one (1) south, range two (2) east; southeast quarter southeast quarter and west half southwest quarter section twenty-seven (27), township one (1) south, range two (2) east; southeast quarter northeast quarter and lots one (1), two (2), and four (4), section twenty-nine (29), township one (1) south, range two (2) east; lots number three (3) and four (4), section thirty-five (35), township one (1) south, range two (2) east; north half of southeast quarter of southwest quarter section one (1), township two (2) south, range two (2) east; southwest quarter northeast quarter and south half northeast quarter section three (3), township two (2) south, range two (2) east; lots four (4) and seven (7), section thirteen (13), township two (2) south, range two (2) east; southwest quarter northwest quarter and southwest quarter section twenty-three (23), township two (2) south, range two (2) east; west half northeast quarter northwest quarter, north half southwest quarter, and northwest quarter southeast quarter section thirty-five (35), township two (2) south, range two (2) east; east half southeast quarter, west half northwest quarter, and west half southwest quarter section (1), township three (3) south, range two (2) east; lots one (1) and two, section three (3), township three (3) south, range two (2) east; southeast quarter northwest quarter, east half southwest quarter, southwest quarter of southwest quarter, east half and lots one (1), two (2), and three (3), section eleven (11), township three (3) south, range two (2) east;

9 east half section thirteen (13), township three (3) south, range two (2) east; northwest quarter section thirteen (13), township three (3) south, range two (2) east; south half southeast quarter and lots one (1), two (2), three (3), four (4), and five (5), section seventeen (17), township three (3) south, range two (2) east; lot five (5), section fifteen (15), township three (3) south, range two (2) east; southeast quarter southeast quarter, and west half southeast quarter section twenty-five (25), township three (3)

south, range two (2) east; north half northeast quarter and northwest quarter section twenty-nine (29), township three (3) south, range two (2) east; north half northeast quarter and north half northwest quarter section thirty-one (31), township three (3) south, range two (2) east; southeast quarter northeast quarter, southwest quarter southeast quarter, west half southwest quarter, southeast quarter southwest quarter, southwest quarter northwest quarter section thirty-one (31), township three (3) south, range two (2) east; northwest quarter and south half section one (1), township four (4) south, range two (2) east; southeast quarter northwest quarter, and east half southwest quarter section three (3), township four (4) south, range two (2) east; west half northwest quarter and west half southwest quarter section five (5), township four (4) south, range two (2) east; northeast quarter section seven (7), township four (4) south, range two (2) east; all section eleven (11), township four (4) south, range two (2) east; north half southeast quarter, west half northeast quarter, and northwest quarter section thirteen (13), township four (4) south, range two (2) east; east half northwest quarter, southwest quarter, and east half section fifteen (15), township four (4) south, range two (2) east; lot two (2), section nineteen (19), township four (4) south, range two (2) east; lot four (4), section nineteen (19), township four (4) south, range two (2) east; south half northeast quarter and northeast quarter southeast quarter section twenty-one (21), township four (4) south, range two (2) east; north half northeast quarter and east half northwest quarter section twenty-one (21), township four (4) south, range two (2) east; north half southwest quarter, northwest quarter, and east half section twenty-three (23), township four (4) south, range two (2) east; east half northeast quarter and south half section twenty-five (25), township four (4) south, range two (2) east; lots one (1) and two (2), section thirty-five (35), township four (4) south, range two (2) east; lots three (3), four (4), and five (5), section one (1), township five (5) south, range two (2) east; lots one (1), two (2), three (3), and four (4), section three (3), township five (5) south, range two (2) east; lots two (2) and three (3), section five (5), township five (5) south, range two (2) east; lots one (1), two (2), and three (3), section seven (7), township five (5) south, range two (2) east; east half northeast quarter and lots two (2) and three (3), section eleven (11), township five (5) south, range two (2) east; south half northeast quarter, southeast quarter, and lots two (2), three (3), and four (4), section thirteen (13), township five (5) south, range two (2) east; south half southwest quarter, section nineteen (19), township five (5) south, range two (2) east; east half northeast quarter, northeast quarter southeast quarter, and lots one (1) and two (2), section twenty-five (25), township five (5) south, range two (2) east; south half northeast quarter, northwest quarter, and south half section thirty-five (35), township five (5) south, range two (2) east; southeast quarter, east half southwest quarter, and north half section one (1), township six (6) south, range two (2) east; northwest quarter, southeast quarter, north half southwest quarter, and north half section three (3), township six (6) south, range two (2) east; all section five (5), township six (6) south, range two (2) east; all section seven (7), township six (6) south, range two (2) east; southwest quarter northeast quarter, northwest quarter northwest quarter, southeast quarter, north half southwest quarter, and southwest

quarter southwest quarter, section nine (9), township six (6) south, range two (2) east; northeast quarter northeast quarter, southwest quarter northeast quarter, southeast quarter northwest quarter, west half northwest quarter, and west half southwest quarter, section eleven (11), township six (6) south, range two (2) east; all section thirteen (13), township six (6) south, range two (2) east; southeast quarter and north half section fifteen (15), township six (6) south, range two (2) east; southeast quarter and north half section seventeen (17), township six (6) south, range two (2) east; all section nineteen (19), township six (6) south, range two (2) east; all section twenty-one (21), township six (6) south, range two (2) east; all section twenty-three, township six (6) south, range two (2) east; southwest quarter and north half section twenty-five (25), township six (6) south, range two (2) east; all section twenty-seven (27), township six (6) south, range two (2) east; northwest quarter northeast quarter, and lot one (1), section five (5), township one (1) south, range three (3) east; southwest quarter northeast quarter, northwest quarter, and lot two (2), section five (5), township one (1) south, range three (3) east; north half northeast quarter section seven (7), township one (1) south, range three (3) east; northwest quarter southwest quarter section thirteen (13), township one (1) south, range three (3) east; west half northwest quarter section fifteen (15), township one (1) south, range three (3) east; lots three (3), four (4), and five (5), section seventeen (17), township one (1) south, range three (3) east; lots one (1) and two (2), section seventeen (17), township one (1) south, range three (3) east; lots seven (7) and eight (8), section nineteen (19), township one (1) south, range three (3) east; east half northeast quarter, east half southeast quarter, southwest quarter southwest quarter, and lot two (2), section twenty-one (21), township one (1) south, range three (3) east; west half southeast quarter and east half southwest quarter, section twenty-one (21), township one (1) south, range three (3) east; south half southwest quarter section twenty-three (23), township one (1) south, range three (3) east; east half northwest quarter, southwest quarter northwest quarter, southwest quarter, east half southeast quarter, and lot one (1), section twenty-five (25), township one (1) south, range three (3) east; northwest quarter section twenty-seven (27), township one (1) south, range three (3) east; southwest quarter section twenty-seven (27), township one (1) south, range three (3) east; south half southeast quarter section twenty-nine (29), township one (1) south, range three (3) east; northeast quarter, north half southeast quarter, and lots one (1), two (2), three (3), and four (4), section twenty-nine (29), township one (1) south, range three (3) east; northwest quarter section thirty-one (31), township one (1) south, range three (3) east; northeast quarter northeast quarter west half northeast quarter, and northwest quarter section thirty-three (33), township one (1) south, range three (3) east; northeast quarter east half northwest quarter, north half southeast quarter, and north half southwest quarter section thirty-five (35), township one (1) south, range three (3) east; northeast quarter and east half southeast quarter section one (1), township two (2) south, range three (3) east; northwest quarter and west half southwest quarter section one (1), township two (2) south, range three (3) east; lot two (2), section nine (9), township two (2) south, range three (3) east; east half northeast quarter, east half southwest quarter, and southeast quarter section eleven

(11), township two (2) south, range three (3) east; north half southeast quarter, and northeast quarter southwest quarter section thirteen (13), township two (2) south, range three (3) east; southeast quarter northeast quarter, and northeast quarter southeast quarter section seventeen (17), township two (2) south, range (3) east; lot two (2), section twenty-one (21), township two (2) south, range three (3) east; lot number five (5), section twenty-one (21), township two (2) south, range three (3) east; lots three (3), four (4), five (5), six (6), and eight (8), section twenty-three (23), township two (2) south, range three (3) east; lot number five (5) section twenty-five (25), township two (2) south, range three (3) east; lots one (1) and six (6), section twenty-five (25), township two (2) south, range three (3) east; lot number four (4), section twenty-nine (29), township two (2) south, range three (3) east; west half northwest quarter and lots three (3), four (4), five (5), six (6), and seven (7), section thirty-one (31), township two (2) south, range three (3) east; south half southeast quarter and lots three (3), four (4), and five (5), section thirty-five (35), township two (2) south, range three (3) east; lots one (1) and two (2), section thirty-five (35), township two (2) south, range three (3) east; lots three (3), four (4), five (5), six (6), seven (7), eight (8), and eleven (11), section one (1), township three (3) south, range three (3) east; lots one (1), two (2), and three (3), section three (3), township three (3) south, range three (3) east; north half northeast quarter, southeast quarter southwest quarter, and lots one (1), two (2), and three (3), section five (5), township three (3) south, range three (3) east; west half northeast quarter, west half southeast quarter southwest quarter, and lots one (1), two (2), three (3), and four (4), section seven (7), township three (3) south, range three (3) east; northwest quarter southwest quarter and lots one (1), two (2), and three (3), section nine (9), township three (3) south, range three (3) east; northwest quarter southeast quarter and lots five (5), six (6), seven (7), and ten (10), section thirteen (13), township three (3) south, range three (3) east; lots one (1), two (2), three (3), six (6), seven (7), and eight (8), section fifteen (15), township three (3) south, range three (3) east; southwest quarter northwest quarter and lot one (1), section seventeen (17), township three (3) south, range three (3) east; north half northwest quarter section nineteen (19), township three (3) south, range three (3) east; northwest quarter northeast quarter section nineteen (19), township three (3) south, range three (3) east; west half southeast quarter section nineteen (19), township three (3) south, range three (3) east; lot one (1), section twenty-three (23), township three (3) south, range three (3) east; lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8), section twenty-five (25), township three (3) south, range three (3) east; southeast quarter northeast quarter, northeast quarter southeast quarter, southwest quarter southeast quarter, and lots one (1), two (2), three (3), four (4), and five (5), section twenty-seven (27), township three (3) south, range three (3) east; southeast quarter south half southwest quarter, northeast quarter northwest quarter, and lots one (1), two (2), three (3), and four (4), section twenty-nine (29), township three (3) south, range three (3) east; northwest quarter northwest quarter section twenty-nine (29), township three (3) south, range three (3) east; northeast quarter southeast quarter, south half southeast quarter, south half southwest

quarter, and northwest quarter southwest quarter section thirty-one (31), township three (3) south, range three (3) east; northwest quarter southwest quarter, and northwest quarter section thirty-three (33), township three (3) south, range three (3) east; north half section thirty-five (35), township three (3) south, range three (3) east; north half north half, southwest quarter southeast quarter, and lots one (1) and (2), section one (1), township four (4) south, range three (3) east; northeast quarter northwest quarter, southwest quarter northwest quarter, northwest quarter southwest quarter, and south half southeast quarter section three (3), township four (4) south, range three (3) east; north half southeast quarter, southwest quarter southeast quarter, and west half section five (5), township four (4) south, range three (3) east; northeast quarter south half northwest quarter, north half southwest quarter, and lot one (1), section seven (7), township four (4) south, range three (3) east; west half northeast quarter, west half southeast quarter, and northeast quarter northwest quarter section nine (9), township four (4) south, range three (3) east; lots one (1), two (2), and three (3), and northwest quarter northeast quarter section eleven (11), township four (4) south, range three (3) east; northeast quarter, west half southeast quarter, and west half section thirteen (13), township four (4) south, range three (3) east; west half northwest quarter section seventeen (17), township four (4) south, range three (3) east; west half southwest quarter section nineteen (19), township four (4) south, range three (3) east; east half northeast quarter, west half northwest quarter, and south half section twenty-one (21), township four (4) south, range three (3) east; all section twenty-three (23), township four (4) south, range three (3) east; northwest quarter northwest quarter southwest quarter and east half section twenty-five (25), township four (4) south, range three (3) east; southwest quarter west half southeast quarter and north half section twenty-seven (27), township four (4) south, range three (3) east; east half northeast quarter, southwest quarter northeast quarter, northwest quarter northwest quarter, east half southwest quarter, and southeast quarter section twenty-nine (29), township four (4) south, range three (3) east; east half northeast quarter, southwest quarter northeast quarter, and southeast quarter

17 section thirty-one (31), township four (4) south, range three (3) east; north half southeast quarter, north half southwest quarter, southwest quarter southwest quarter, and north half section thirty-three (33), township four (4) south, range three (3) east; southwest quarter northeast quarter, south half northwest quarter, southwest quarter, and northwest quarter southeast quarter section thirty-five (35), township four (4) south, range three (3) east; southeast quarter northeast quarter, east half southeast quarter, and southwest quarter southeast quarter section thirty-five (35), township four (4) south, range three (3) east; all section one (1), township five (5) south, range three (3) east; all section three (3), township five (5) south, range three (3) east; south half northeast quarter, south half northwest quarter, southwest quarter, and lots one (1) and two (2), section five (5), township five (5) south, range three (3) east; northeast quarter southeast quarter, northwest quarter northeast quarter, southwest quarter, north half southeast quarter, southeast quarter of southeast quarter, and lot three (3), section seven (7), township

five (5) south, range three (3) east; all section eleven (11), township five (5) south, range three (3) east; all of section thirteen (13), township five (5) south, range three (3) east; all section fifteen (15), township five (5) south, range three (3) east; all section seventeen (17), township five (5) south, range three (3) east; southwest quarter northeast quarter, south half northwest quarter, northwest quarter northwest quarter, and south half section nineteen (19), township five (5) south, range three (3) east; all section twenty-one (21), township five (5) south, range three (3) east; all section twenty-three (23), township five (5) south, range three (3) east; all section twenty-five (25), township five (5) south, range three (3) east; all section twenty-seven, township five (5) south, range three (3) east; east half southeast quarter, west half southwest quarter, and north half section twenty-nine (29), township five (5) south, range three (3) east; northwest quarter northeast quarter, southwest quarter, and lots one (1) and two (2), section thirty-one (31), township five (5) south, range three (3) east; all section thirty-three (33), township five (5) south, range three (3) east; north half section thirty-five (35), township five (5) south, range three (3) east; all section one (1), township one (1) south, range four (4) east; all section three (3), township one (1) south, range four (4) east; all section eleven (11), township one (1) south, range four (4) east; all section thirteen (13), township one (1) south, range four (4) east; northwest quarter and east half section fifteen, township one (1) south, range four (4) east; northeast quarter section seventeen (17), township one (1) south, range four (4) east; southwest quarter section twenty-three (23), township one (1) south, range four (4) east; northwest quarter and east half section twenty-three (23), township one (1) south, range four (4) east; all section twenty-five (25), township one (1) south, range four (4) east; northeast quarter and west half section one (1), township two (2) south, range four (4) east; north half southeast quarter section one (1), township two (2) south, range four (4) east; east half northeast quarter and northeast quarter southeast quarter section three (3), township two (2) south, range four (4) east; east half northeast quarter and southeast quarter section seven (7), township two (2) south, range four (4) east; all section nine (9), township two (2) south, range four (4) east; all section eleven (11), township two (2) south, range four (4) east; north half northeast quarter, north half northwest quarter, southwest quarter northwest quarter, northwest quarter southwest quarter, and southeast quarter section thirteen (13), township two (2) south, range four (4) east; all section fifteen (15), township two (2) south, range four (4) east; north half section seventeen, township two (2) south, range four (4) east; north half northeast quarter, southeast quarter northeast quarter, and lots one (1), two (2), and four (4), section nineteen (19), township two (2) south, range four (4) east; northeast quarter northeast quarter and southwest quarter section twenty-one (21), township two (2) south, range four (4) east; north half northeast quarter, northeast quarter northwest quarter, west half northwest quarter, south half southwest quarter, and south half southeast quarter section twenty-three (23), township two (2) south, range four (4) east; all section twenty-five (25), township two (2) south, range four (4) east; south half northeast quarter, south half northwest quarter, and south

half section twenty-seven (27), township two (2) south, range four (4) east; east half northeast quarter, southwest quarter northeast quarter, and southeast quarter southeast quarter section thirty-three (33), township two (2) south, range four (4) east; all section thirty-five (35), township 2 south, range four (4) east; all section one (1), township three (3)

20 south, range four (4) east; southeast quarter southwest quarter section three (3), township three (3) south, range four (4) east;

south half southeast quarter section three (3), township three (3)

south, range four (4) east; lots two (2) and three (3), section five (5), township three (3) south, range four (4) east; lots one (1) and two (2),

section nine (9), township three (3) south, range four (4) east; all section eleven (11), township three (3) south, range four (4) east; all section

thirteen (13), township three (3) south, range four (4) east; southeast quarter northeast quarter, west half northwest quarter, and lots one (1),

two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), and ten (10), section nineteen (19), township three (3) south, range four

(4) east; north half northeast quarter, southwest quarter northeast quarter, and lots one (1), two (2), three (3), and four (4), section twenty-one

(21), township three (3) south, range four (4) east; lots one (1), two (2), three (3), five (5), six (6), and seven (7), section twenty-three (23), town-

ship three (3) south, range four (4) east; east half northwest quarter and east half section twenty-five (25), township three (3) south, range four

(4) east; west half northwest quarter and south half section twenty-seven (27), township three (3) south, range four (4) east; south half

southeast quarter and lots one (1), two (2), three (3), five (5), seven (7), and eight (8), section twenty-nine (29), township three (3) south, range

four (4) east; northwest quarter northwest quarter and lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), and nine (9),

section thirty-one (31), township three (3) south, range four (4) east; east half and lots one (1), two (2), three (3), four (4), and five (5),

section thirty-three (33), township three (3) south, range four (4)

21 east; south half southwest quarter section thirty-five (35), township three (3) south, range four (4) east; southwest quarter and east half

section one (1), township four (4) south, range four (4) east; northwest quarter (east half), southwest quarter (east half), and lots one (1) and two

(2), section three (3), township four (4) south, range four (4) east; northwest quarter northeast quarter, northwest quarter northwest quarter, southwest

quarter, and lot one (1), section seven (7), township four (4) south, range four (4) east; southeast quarter southeast quarter and lots one (1), two (2),

three (3), four (4), five (5), six (6), seven (7), eight (8), and nine (9), section nine (9), township four (4) south, range four (4) east; northwest

quarter, east half southwest quarter, and east half and lots one (1) and two (2), section eleven (11), township four (4) south, range four (4) east; all

section thirteen, township four (4) south, range four (4) east; south half southwest quarter, east half, and lots one (1), two (2), three (3), four (4),

and five (5), section fifteen (15), township four (4) south, range four (4) east; southwest quarter northwest quarter, southwest quarter, south half

southeast quarter, and lots one (1), four (4), five (5), seven (7), and eight (8), section seventeen (17), township four (4) south, range four (4) east;

south half northeast quarter and south half northwest quarter and south half section nineteen (19), township four (4) south, range four (4) east;

all section twenty-one (21), township four (4) south, range four (4) east;
 all section twenty-three (23), township four (4) south, range four (4) east;
 west half section twenty-five (25), township four (4) south, range four (4)
 east; all section twenty-seven (27), township four (4) south, range
 22 four (4) east; all section twenty-nine (29), township four (4) south,
 range four (4) east; all section thirty-one (31), township four (4)
 south, range four (4) east; all section thirty-three (33), township four (4)
 south, range four (4) east; all section thirty-five (35), township four (4)
 south, range four (4) east; west half section three (3), township five (5)
 south, range four (4) east; all section five (5), township five (5) south,
 range four (4) east; all section seven (7), township five (5) south, range
 four (4) east; all section nine (9), township five (5) south, range four (4)
 east; west half section five (5), township one (1) south, range five (5)
 east; all section seven (7), township one (1) south, range five (5) east; all
 section seventeen (17), township one (1) south, range five (5) east; all
 section nineteen (19), township one (1) south, range five (5) east; west
 half section twenty-one (21), township one (1) south, range five (5) east;
 all section twenty-nine (29), township one (1) south, range five (5) east;
 northeast quarter, east half northwest quarter, lot one of northwest quar-
 ter, northeast quarter southwest quarter, and southeast quarter section
 thirty-one (31), township one (1) south, range five (5) east; west half
 northeast quarter, west half southeast quarter, and west half section thirty-
 three, township one (1) south, range five (5) east; all section three (3),
 township two (2) south, range five (5) east; all section five (5), township
 two (2) south, range five (5) east; southwest quarter northeast quarter,
 south half northwest quarter, and lots one (1), two (2), three (3), and five
 (5), section seven (7), township two (2) south, range five (5) east; north
 half section nine (9), township two (2) south, range five (5) east;
 23 west half section eleven (11), township two (2) south, range five
 (5) east; all section fifteen (15), township two (2) south, range
 five (5) east; northeast quarter northwest quarter, northwest quarter, and
 south half southwest quarter section seventeen (17), township two (2)
 south, range five (5) east; west half southeast quarter, northeast quarter,
 and west half section nineteen (19), township two (2) south, range five
 (5) east; southwest quarter northwest quarter and south half section
 twenty-one (21), township two (2) south, range five (5) east; west half
 section twenty-three (23), township two (2) south, range five (5) east;
 all section twenty-seven (27), township two (2) south, range five (5)
 east; east half southwest quarter, southeast quarter, and north half
 section twenty-nine (29), township two (2) south, range five (5) east;
 all section thirty-one (31), township two (2) south, range five (5)
 east; all section thirty-three (33), township two (2) south, range five (5)
 east; all section three (3), township three (3) south, range five (5) east;
 all section five (5), township three (3) south, range five (5) east; south-
 east quarter and north half section seven (7), township three (3) south,
 range five (5) east; southwest quarter section seven (7), township three
 three (3) south, range five (5) east; southeast quarter section nine (9),
 township three (3) south, range five (5) east; west half section nine (9),
 township three (3) south, range five (5) east; west half section fifteen (15),
 township three (3) south, range five (5) east; all section twenty-one (21),
 township three (3) south, range five (5) east; all section seventeen (17),

township three (3) south, range five (5) east; all section nineteen (19), township three (3) south, range five (5) east; all section twenty-nine (29), township three (3) south, range five (5) east; north half section thirty-one (31), township three (3) south, range five (5) east; south half section thirty-one (31), township three (3) south, range five (5) east; northwest quarter section thirty-three (33), township three (3) south, range five (5) east; all section seven (7), township four (4) south, range five (5) east; south half section thirty-five (35), township five (5) south, range three (3) east; east half section twenty-five, township four (4) south, range four (4) east; all section one (1), township two (2) south, range five (5) east; east half section eleven (11), township two (2) south, range five (5) east; all section thirteen (13), township two (2) south, range five (5) east; east half section twenty-three (23), township two (2) south, range five (5) east; all section twenty-five (25), township two (2) south, range five (5) east; all section thirty-five (35), township two (2) south, range five (5) east; all section one (1), township three (3) south, range five (5) east; all section eleven (11), township three (3) south, range five (5) east; all section thirteen (13), township three (3) south, range five (5) east; east half section fifteen (15), township three (3) south, range five (5) east; all section twenty-three (23), township three (3) south, range five (5) east; north half northeast quarter, north half northwest quarter section twenty-five (25), township three (3) south, range five (5) east; south half northeast quarter, south half northwest quarter, and south half section twenty-five (25), township three (3) south, range five (5) east; south half northeast quarter, south half northwest quarter, and south half section twenty-seven (27), township three (3) south, range five (5) east; north half northeast quarter and north half northwest quarter, section twenty-seven (27), township three (3) south, range five (5) east; northeast quarter section thirty-three (33), township three (3) south, range five (5) east; south half section thirty-three (33), township three (3) south, range five (5) east; all section thirty-five (35), township three (3) south, range five (5) east; all section one (1), township four (4) south, range five (5) east; all section three (3), township four (4) south, range five (5) east; all section five (5), township four (4) south, range five (5) east; all section nine (9), township four (4) south, range five (5) east; all section eleven (11), township four (4) south, range five (5) east; all section thirteen (13), township four (4) south, range five (5) east; all section fifteen (15), township four (4) south, range five (5) east; all section seventeen (17), township four (4) south, range five (5) east; all section twenty-one (21), township four (4) south, range five (5) east; all section twenty-three (23), township four (4) south, range five (5) east; northeast quarter section twenty-seven (27), township four (4) south, range five (5) east; and your orator avers that said lands are of great value, to wit, of the value of one hundred and fifty thousand dollars.

4th Par. And your orator further shows that by an act of the Congress of the United States, entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes," approved September 29, 1890, the United States resumed title to and restored to the public domain all lands theretofore granted to aid in the construction of a railroad opposite to and coterminous with the

26 portion of any such railroad not then completed and in operation for the construction or benefit of which such lands were granted. And your orator avers that the said Northern Pacific Railroad Company had not on said 29th day of September, 1890, completed, and was not then operating, any portion of its said railroad opposite to or coterminous with any of the above-described lands, and said company has not yet built, and is not now building, and is not operating, any railroad opposite to or coterminous with said above-described lands.

5th Par. And your orator further shows that the Congress of the United States, by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July 25, 1866, authorized such company organized under the laws of Oregon as the legislature of said State should thereafter designate to construct a railroad and telegraph line within the State of Oregon, beginning at the city of Portland and running thence through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon, there to connect with another railroad authorized in said act to be built in the State of California, and granted to such Oregon company every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, ten on each side of said railroad line; and when any of said alternate sections, or parts of sections, should be found to have been granted, sold, reserved, occupied by

27 homestead settlers, preempted, or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said company shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior should withdraw from sale public lands therein granted on each side of said railroad, so far as located and within the limits before specified. And your orator shows that by a joint resolution adopted October 20, 1868, of the legislature of the State of Oregon, the Oregon Central Railroad Company was designated, in accordance with said last-mentioned act of Congress, as capable of receiving and undertaking the privileges, franchises, grants, and duties above set forth, and did become the corporation entitled to all the benefits and subject to all the obligations of said act of Congress, and that on or about April 4, 1870, the said Oregon and California Railroad Company, a corporation duly organized under the laws of Oregon, became the successor and assign of said Oregon Central Railroad Company.

6th Par. And your orator further shows that on the 29th day of October, 1869, the said Oregon Central Railroad Company, having theretofore in due form filed its acceptance of said grant in all respects in accordance with law, filed with the Secretary of the Interior its

28 map of definite location opposite the lands in question in this suit. Your orator shows that the said map of definite location of said road was accepted by the Secretary of the Interior on January 29, 1870, and the lands above described were in February, 1870, withdrawn in

pursuance of orders issued by the Secretary of the Interior, and the railroad of said company was duly constructed opposite these lands within the time limited by law for the completion of the said portion of said road; that on request of the said company, it having, as it alleged, 20 consecutive miles of its railroad next south of Portland ready for the service contemplated by the act pursuant to section 4 of said act of Congress of July 25, 1866, commissioners were duly appointed by the President of the United States to examine the said road, and on December 31, 1869, the said commissioners made due report of the completion and equipment of said 20 miles of railroad, as required by said act; and on January 29, 1870, the then President of the United States accepted and approved this report, and ordered patents to issue to the said company for the lands in granted limits, coterminous with said completed road; that in like manner on September 28, 1870, the report of the second set of commissioners—who had been duly appointed by the President of the United States, on like request of the said Oregon and California Railroad Company as to a second section of 20 miles next south of the section of 20 miles last above referred to—was duly made to the then President of the United States of the due completion and equipment of said second section of 20 miles, which report was duly accepted and

approved by the then President of the United States, and patents
29 in like manner ordered to issue to said company for lands in granted or place limits, coterminous with said second section of 20 miles.

This report, with the preceding one, making 40 miles in all, covered the line of said company's railroad opposite all the lands described herein, and some distance southwardly therefrom.

On said action by said Commissioners and the President, on May 9, 1871, July 12, 1871, June 22, 1876, and June 18, 1877, there were issued and delivered in the usual form, by the officers whose duty it was to execute and issue patents in such cases when patents might properly issue, patents for a large amount of lands, in which total are included the lands embraced and described in this bill.

And your orator files herewith and makes a part hereof certified copies of said patents, the same being designated as "Exhibit M," and your orator shows that all the lands hereinbefore described are within the limits of the grant as prescribed in said act of July 25, 1866, whether place or indemnity. And your orator shows that the entire line of railroad of the said Oregon and California Railroad Company has been fully constructed and been duly accepted by the President of the United States after due reports by Commissioners on the several sections thereof, and has been continuously, and still is, operated by said company; but a portion of said road, to wit, one hundred and sixty-three (163) miles, was constructed after July 1, 1880. But your orator avers that the ministerial officers
30 of your orator acted erroneously and contrary to law in issuing the patents for the lands described herein under the facts as stated herein, and so your orator avers that said patent^s are void and should be so declared. But said company still claims title to said lands under said patents and withholds the said lands from orator.

Orator also files herewith and makes part hereof, marked "Exhibit L," a copy of the map of the definite location of the Oregon Central Railroad of January 29, 1870, and the orders of withdrawal upon it made by the then Secretary of the Interior.

And orator asks that all the acts and resolutions of the Congress of the United States referred to in this bill may be treated as though fully recited and set out herein.

7th par. Your orator would further show that it is informed and believes, and so charges the fact to be, that one John A. Hurlburt claims to be the owner in fee simple of the following tracts of land involved in the controversy, viz: The southeast quarter and the south half of the northeast quarter of section No. three, township No. one south, range four east, Multnomah County, Oregon; his claim of title being as follows: Patent from the United States to the Oregon and California Railroad Company purported to convey said lands to said company, the same being one of the patents sought to be canceled as a whole or in part by this bill.

On February 7, 1880, the said Oregon and California Railroad Company, for a valuable consideration paid it by said Hurlburt, sold said lands to him, Hurlburt, and by its deed of conveyance, warranty in form,

dated February 26, 1880, said company conveyed the said lands, 31 so far as it could by deed convey the same, to said Hurlburt, who thereupon, at said last-named date, went into actual possession of said lands and made valuable and permanent improvements thereon, and has remained in possession thereof to this date, the value of said lands and improvements being at this time the sum of six thousand dollars.

Also, that one Thomas L. Evans claims to be the owner in fee simple of the following-described lands, viz: The northeast quarter of the northeast quarter and the east half of the northwest quarter of the northeast quarter of section three, township No. one south, range four east, in said Multnomah County, Oregon; that these lands were embraced in one of the said patents purporting to convey the said lands by the United States to said Oregon and California Railroad Company.

These lands were sold by said company for a valuable consideration to Jacob Goldstrap, and conveyed by the warranty deed (so far as said company could convey) on November 5, 1879, to said Goldstrap. Goldstrap by his deed conveyed the said land (so far as he could convey) to one Sylvester E. Evans, who, by his warranty deed, conveyed (so far as he could convey) said lands to Thomas L. Evans, July 13, 1883. Said lands have upon them valuable and permanent improvements placed there by said Thomas L. Evans, who went into possession of said lands at the date of the conveyance to him, and has remained in possession of the same to this date. The value of these lands at this time is four thousand dollars.

Said John A. Hurlburt and Thomas L. Evans each claim the 32 title to said lands respectively in fee simple, and your orator concedes that they were severally purchased and granted from the said Oregon and California Railroad Company in good faith for value, relying on the apparent title to said lands under said patent, from orator to said railroad company, and without actual notice of any defect in the title of said company to said lands, as set forth in this bill.

But orator insists that they were chargeable with constructive notice of the several acts of Congress, and that under the said acts of Congress and the acts and doings of the said railroad company no title could pass

to said Hurlburt and Evans, and that said patent should be canceled as to them as well as to the grantee therein, the said Oregon and California Railroad Company.

8th par. And your orator further shows that the Congress of the United States, by an act entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, directed and authorized the Secretary of the Interior to adjust all grants theretofore unadjusted, and if it should appear that any lands have been erroneously patented to any railroad company, to make demand for relinquishment or reconveyance, and if such company should refuse to reconvey within ninety days, then it should be the duty of the Attorney-General to commence and prosecute in the proper court the necessary proceedings to cancel such patents and restore the title to the United States. And your orator avers that on the 23rd day of March,

1892, the total grant of lands in the State of Oregon under said act of July 25, 1866, to said Oregon Railroad Company, to the rights of which the said Oregon and California Railroad Company has succeeded as aforesaid, was unadjusted, and the Secretary of the Interior, regarding the said patents to the above-described lands as erroneously issued, directed the Commissioner of the General Land Office to request reconveyance as provided by statute, and in accordance with such direction the Commissioner of the General Land Office did, on said 23rd day of March, 1892, make demand of the said railroad company, by a letter addressed to one G. H. Andrews, acting land agent of said railroad company, for the reconveyance of said above-described lands, and your orator avers that on the second day of April, 1892, said G. H. Andrews, acting land agent as aforesaid, did, on behalf of said company, by letter addressed to the Commissioner of the General Land Office, refuse to so reconvey said lands, and that the approval of the president of said company was endorsed on such letter, and your orator avers that said company has ever since refused, and still does refuse, to reconvey said lands.

Forasmuch, therefore, as your orator is without adequate remedy in a court of law, and to the end that the said defendants may, if they can, show why your orator should not have the relief hereinafter prayed, and the matters herein may be determined according to equity and good conscience, your orator brings this suit, and prays that the patent or patents, or part or parts thereof, purporting to convey title to said above-described lands may be set aside, canceled, and decreed null and void, and

34 that the said alleged conveyances from said railroad company, or any person or persons purporting to convey title pretended to be derived from the United States under any patent or patents to said railroad company in and to said above-described lands, may be canceled, set aside, and decreed to be null and void, and your orator prays all other and proper relief in the premises.

And may it please your honors to grant unto your orator the writ of subpoena issuing out of and under the seal of this court, directed to the defendants, the Oregon and California Railroad Company, John A. Hurlburt, and Thomas L. Evans, commanding them and each of them at a certain day and under a certain penalty, therein to be specified, personally to be and appear in this court, and then and there to answer, "but

not under oath" (answer under oath being hereby expressly waived), herein, and to stand to, perform, and abide such order and decree as to your honors may seem proper.

W. H. H. MILLER,
Attorney-General of the United States.
FRANKLIN P. MAYN,
U. S. Attorney.

(Endorsed:) Filed February 3, 1893. R. H. Lamson, clerk.

And afterwards, to wit, on the 6th day of March, 1893, there was duly filed in said court a *præcipe* for appearance of defendants, in words and figures as follows, to wit:

35 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES OF AMERICA, COMPLAINANT,	} No. 1982.
<i>vs.</i>	
THE OREGON & CALIFORNIA RAILROAD COMPANY,	
John A. Hurlburt, and Thomas L. Evans, de-	
fendants.	

Præcipe for appearance of defendants.

To the clerk of the above-entitled court:

You will please enter our appearance as solicitors in the above-entitled cause for the defendants, the Oregon & California Railroad Company, John A. Hurlburt, and Thomas L. Evans.

E. C. BRONAUGH.
L. L. MCARTHUR.
W. D. FENTON.

(Endorsed:) Filed and entered March 6, 1893. R. H. Lamson, clerk.

And afterwards, to wit, on the 17th day of March, 1893, there was duly filed in said court a demurrer to bill in words and figures as follows, to wit:

36 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES OF AMERICA, COMPLAINANT,	} Demurrer.
<i>vs.</i>	
THE OREGON & CALIFORNIA RAILROAD COMPANY,	
John A. Hurlburt, and Thomas L. Evans, de-	
fendants.	

Demurrer to bill of complaint.

The demurrer of the above-named defendants, the Oregon & California Railroad Company, John A. Hurlburt, and Thomas A. Evans, to the bill of complaint of the above-named complainant. These defendants,

by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show :

I.

That it appeareth by the complainant's own showing by the said bill that complainant is not entitled to the relief prayed by the bill against these defendants, or either of them.

II.

That it appears by the said bill of complaint that the complainant is without equity in the premises, and is not entitled to any relief.

37

III.

That the bill of complaint does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants, or either of them.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and pray the judgment of this honorable court whether they be compelled to make any answer to the said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

E. C. BRONAUGH,
L. L. McARTHUR,
W. D. FENTON,

*Solicitors for the Defendants, Oregon & California Railroad
Company, John A. Hurlburt, and Thomas L. Evans.*

BRONAUGH, McARTHUR, FENTON & BRONAUGH,
Counsel for Defendants.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, George H. Andrews, being first duly sworn, say I am secretary of the Oregon & California Railroad Company, one of the defendants above named, and that the foregoing demurrer is not interposed for delay.

GEO. A. ANDREWS.

38 Subscribed and sworn to before me this 15th day of March, 1893.
[SEAL.]

W. D. FENTON,
Notary Public for Oregon.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

W. D. FENTON,
*One of Solicitors for Defendants, The Oregon & California
Railroad Company, John A. Hurlburt, and Thomas L. Evans.*

STATE OF OREGON,

County of Multnomah, ss:

Due service of the within demurrer is hereby accepted in said county, Oregon, this 17th day of March, 1893, by receiving a copy thereof, duly certified to as such, by W. D. Fenton, one of attorneys for defendants.

F. P. MAYS.

By C. E. LOCKWOOD,

Attorneys for Complainant.

(Endorsed :) Filed March 17, 1893. R. H. Lamson, clerk.

And afterwards, to wit, on Thursday, the 10th day of August, 1893, the same being the 103d judicial day of the regular April term of said court—present, the honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said case, to wit :

39 In the circuit court of the United States for the district of Oregon. August 10, 1893.

THE UNITED STATES

*vs.*THE OREGON AND CALIFORNIA RAILROAD
Company et al.

No. 1982.

Order setting demurrer for hearing.

Now, at this day comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and the defendants by Mr. W. D. Fenton, of counsel ; and on motion of said plaintiff it is ordered that this cause be, and the same is hereby, set for hearing on the demurrer to the bill on Saturday, August 12, 1893.

And afterwards, to wit, on Saturday, the 12th day of August, 1893, the same being the 105th judicial day of the regular April term of said court—present, the honorable William B. Gilbert, United States circuit judge presiding—the following proceedings were had in said case, to wit :

40 In the circuit court of the United States for the district of Oregon. August 12, 1893.

THE UNITED STATES

*vs.*THE OREGON AND CALIFORNIA RAILROAD
Company et al.

No. 1982.

Order allowing amendment to bill, &c.

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and Mr. John M. Gearin, special assistant United States attorney, and the defendants, by Mr. W. D. Fenton and Mr. L. E. Payson, who is allowed to appear specially in this cause, of counsel, and this

cause comes on to be heard upon the demurrer to the bill; whereupon, on motion of said plaintiff, it is ordered that it be allowed to file an amendment to said bill; and thereupon this cause comes on to be heard upon said demurrer standing to said bill as amended; and the court, having heard the arguments of counsel, will advise thereof.

And afterwards, to wit, on the 12th day of August, 1893, there was duly filed in said court an amendment to bill in words and figures as follows, to wit:

41 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES OF AMERICA	} In equity.
<i>vs.</i>	
THE OREGON & CALIFORNIA RAILROAD	
Company, John A. Hurlburt, and Thomas L. Evans.	

Amendment to bill.

The complainant, The United States of America, by Daniel R. Murphy, its attorney, comes, and by leave of court first had and obtained, makes this amendment to the bill of complaint filed herein, to be considered as inserted in said bill at the end of paragraph 3rd, to wit:

Your orator would further show—

1st. That no other maps of route or location of the line of the proposed railroad of said Northern Pacific Railroad Company between Wallula and Portland were ever filed either with the Secretary of the Interior or the Commissioner of the General Land Office.

2nd. That after the maps of August 4, 1870, hereinbefore referred to and marked "Exhibit A," were filed, there were two withdrawals of 20 miles each (on account of the said maps covering the said proposed line from Wallula to Portland) in Oregon, the first being based on a letter of Secretary Cox of August 13, 1870, and the second on a letter of the same officer dated October 27, 1870.

42 3rd. That these two withdrawals were all that were made in Oregon upon that portion of the line of the Northern Pacific Railroad between the points named.

4th. That no withdrawal of indemnity lands was ever ordered or made on account of said line of road between the points named.

Your orator attaches hereto and makes part of this amendment to said bill two certain certificates of the Commissioner of the General Land Office (with accompanying papers to the second) marked, respectively, "Exhibit 1" and "Exhibit 2." Orator nevertheless reserves to itself the right to insist, if it shall be so advised hereafter and herein, that said maps of August 4, 1870, marked "Exhibit A," and said map of March 6, 1865, marked "Exhibit C," to the original bill were maps of definite location of said Northern Pacific Railroad of its line from Wallula Junction to Portland, Oregon.

DANIEL R. MURPHY,
U. S. Attorney.

(Endorsed:) Filed August 12, 1893. R. H. Lamson, clerk.

And afterwards, to wit, on Friday, the 8th day of September, 1893, the same being the 128th judicial day of the regular April term of said court—present, the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said case, to wit:

43 In the circuit court of the United States for the district of Oregon,
September 8, 1893.

THE UNITED STATES

vs.

THE OREGON AND CALIFORNIA RAILROAD
Company, John A. Hurlburt, and Thomas
L. Evans.

No. 1982.

Order overruling demurrer to bill.

This cause was heard upon the demurrer of the defendants to the bill of complaint herein, and was argued by Mr. Daniel R. Murphy, United States attorney, and Mr. John M. Gearin, special assistant United States attorney, for the plaintiff, and by Mr. W. D. Fenton and Mr. L. E. Payson, of counsel for said defendants; on consideration whereof it is ordered and adjudged that said demurrer be, and the same is hereby, overruled.

And afterwards, to wit, on the 8th day of September, 1893, there was duly filed in said court an opinion in words and figures as follows, to wit:

44 In the circuit court of the United States for the district of Oregon,
Friday, September 8, 1893.

THE UNITED STATES

vs.

THE OREGON AND CALIFORNIA RAILROAD
Company, John A. Hurlburt, and Thomas
L. Evans.

No. 1982.

Opinion on demurrer to bill.

GILBERT, J.:

By act of Congress of July 25, 1866, a grant of lands was made to the Oregon & California Railroad Company to aid in the construction of a line of railroad within the State of Oregon, beginning at Portland and running thence to the southern boundary of the State, thence to connect with a proposed line of railroad in California, running from the State line to a point of connection with the Central Pacific Railroad in the Sacramento Valley.

The grant was made in the usual form, and covered every alternate section of public land, not mineral, designated by odd sections, to the amount of 10 sections per mile on either side of the line, reserving therefrom lands granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, for which lands indemnity was to be allowed as provided in the act. Under the provisions of this act the beneficiary filed its map of definite location for a distance of 60

45 miles south of Portland on October 29, 1869, and upon January 31, 1870, the lands within the grant for that distance were, by

the Secretary of the Interior, withdrawn from settlement. A portion of the road was thereupon constructed, and commissioners were appointed to examine and report thereon. On December 31, 1869, the commissioners reported that the road had been duly built for the first 20 miles south from Portland. On September 28, 1870, the commissioners reported the due construction of the next 20 miles. Both these reports were approved by the President, and patents for the lands coterminous with the completed road were issued to the Oregon & California Railroad Company, of dates May 9, 1871, July 12, 1871, June 22, 1876, and June 18, 1877.

The United States brings this suit to cancel said patents and to restore said lands to the public domain, upon the ground that the lands were not within the grant to said railroad company, and said patents were erroneously issued. There is involved in the suit approximately 100,000 acres of patented lands and 120,000 not patented.

The merits of the controversy are presented upon a demurrer to the bill.

It is the contention of the United States that the lands were the subject of a grant to the Northern Pacific Railroad Company prior in date to the grant to the Oregon & California Railroad Company, and that, therefore, they were not included in the grant to the latter company, but were, upon the other hand, expressly excluded therefrom by the words
46 reservation, whereby prior "granted" lands were taken out of the operation of the latter grant.

On the second day of July, 1864, by act of Congress, the Northern Pacific Railroad Company was incorporated. (13th Stat. at Large, 365.)

A portion of section 1 and secs. 2, 3, and 6 provide as follows:

"And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.

"SECTION 2. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, etc., for the construction thereof. Said way is granted to said rail-
47 road to the extent of two hundred feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations, and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy, and the welfare of the said Indians, the Indian

titles to all the lands falling under the operation of this act, and acquired in the donation to the road named in this bill.

"SECTION 3. And be it further enacted, that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure a safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time

any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; provided that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act," etc.

Section 6 provides that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed and as fast as may be required by the construction of said railroad, etc.

The defendants raise a question of construction of this act which, if well taken, disposes of the controversy at the outset. They urge that the grant is to be strictly construed against the grantees therein named, and that by the terms thereof land is granted only in aid of the construction of the main line of the Northern Pacific and not in aid of the branch line by way of the Columbia River Valley to Portland.

I do not so construe the language of the grant. The act authorized the company to build and operate a continuous road, "beginning at Lake Superior and running thence westerly to some point on Puget Sound, with a branch line via the Columbia River Valley to Portland."

It then granted to the company permission to take material for the construction of "said road" from the public lands adjacent thereto, and gave a right of way upon public lands 200 feet "on each side of said railroad." It granted lands in aid of the construction, and the grant extends to lands on each side of "said railroad line" and makes the further provision that as soon as the general route is fixed the President shall cause the granted lands to be surveyed for 40 miles on both sides of "the entire line."

Throughout the act the reference is to the road with its branches, as a single line or road. In the words of the act, the grant of land is coextensive with the grant of right of way and the grant of other privileges.

There is as much reason for confining the grant of way to the main trunk line as for confining the grant of subsidy to that portion of the road. The road with its branch is referred to as one road in the act and we have no warrant for saying it is not properly so described.

In view of the subsequent action of the company, however, it becomes immaterial whether or not there was a grant in aid of the branch line. Under the terms of the act the company had the power to locate the main line by the valley of the Columbia River if it so chose, and, as will be seen, that route was subsequently selected and maps were filed in accordance therewith, and whatever rights the Northern Pacific Company acquired to the definite sections of land involved in this suit it obtained by reason of so locating its main line.

These lands being included in the general terms of the grant in aid of the construction of the Northern Pacific Railroad, it is obvious that they were excluded from the operation of the grant to the Oregon & California Company, unless (1) they are within the reservation contained in the grant to the Northern Pacific Company, or (2) the failure of that company to construct its road via the Columbia River Valley and to comply with the condition subsequent, upon which the grant was made, operated to take the lands out of the reservation contained in the grant to the Oregon & California Company whereby all "granted" lands were excepted therefrom.

It is urged by the defendants that the reservation contained in the grant to the Northern Pacific Railroad Company expressly excludes from that grant the lands in question in this suit.

That grant was of "every alternate section of public land," etc., "not reserved, sold, granted," etc., "at the time the line of said road is definitely fixed and a plat thereof filed in the Office of the Commissioner of the General Land Office; and whenever prior to said time any of said sections or parts of sections shall have been granted * * * or otherwise disposed of other lands shall be selected by said company in lieu thereof."

The argument is that inasmuch as prior to time of fixing the definite line of the Northern Pacific Railroad a grant of the same lands was made to the Oregon & California Company, the lands fall within the description of "granted" lands, which are expressly excepted from the operation of the prior grant. In other words, while the lands in controversy were not "granted" lands at the time of the grant to the Northern Pacific Company, so as to be excluded from the lands conferred upon

that company at that time, yet within the time limited thereafter in which that company could establish its right thereto, they were withdrawn from that grant by the act of Congress whereby they were bestowed upon another company, and that the contingency of such withdrawal and subsequent disposal was contemplated and provided for in the prior grant when the exception of granted lands was incorporated therein.

It is urged that there was no law to prohibit a second conditional grant of the same lands in aid of a second railroad before anything should

have been done by the first company, and with the understanding that whatever should be taken by the second company should be in subordination to the rights of the first company.

It may be conceded that the power of Congress in this direction was plenary. But the question here is not what Congress had the power to do. It is, What did Congress do? What was the intention of Congress in inserting the reservation of granted lands from the operation of the first grant?

In the light afforded by the policy of the Government in relation to the disposition of the public lands in aid of railroad construction, and in view of the settled doctrine of the courts in relation to the nature of the title which passes under such grants, it would seem that the reservation of "granted" lands was not made in contemplation of a subsequent bestowal of the lands in aid of another road. Under such a construction the object of the first grant would be liable to be wholly defeated

by a second grant, and the beneficiary of any railroad grant, while
52 complying strictly with the conditions imposed thereupon, might be deprived of the aid upon which the construction of its road depended.

In *Mo., etc., Ry. Co. vs. Kan. Pac. Ry. Co.* (97 U. S., 498), the reservation in the first grant was of lands which were not "sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim had not attached at the time the line was definitely fixed." The court, in construing the grant, speaking by Mr. Justice Field, said:

"As the sections mentioned could only be known when the route of the road was established, which might not be for years, the Government did not intend to withhold the lands in the meantime from occupation and sale, and thus retard the settlement of the country, nor to exclude the land from appropriation for public uses. And the object of the reservation was to protect the acquisition of rights in this way to lands falling within the limits of the grant and to exclude from its operation lands specially reserved and lands of a special character, such as mineral lands, other than those of iron or coal, the sale of which was seldom permitted anywhere, and swamp lands. The grant made was in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specially withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the Government.

It was not within its language or purpose to except from its
53 operation any portion of the designated lands for the purpose of aiding in the construction of other roads."

In the recent case of *St. Paul & Pacific vs. Northern Pacific* (139 U. S., 17), the court said: "We are of opinion that the exception in the act of making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the *the* construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself."

But the grant to the Oregon & California Railroad Company contained a like reservation of "granted" lands, and it is next to be considered

whether the lands in controversy were so affected by the grant to the Northern Pacific Company that at the time the grant to the Oregon & California Company took effect they were "granted" lands, and were, therefore, not within the operation of the latter grant.

The nature of the grant itself and the title that passed thereunder is well settled by numerous adjudications. In *St. Paul & Pacific vs. Northern Pacific* (139 U. S., 5), Mr. Justice Field said, speaking for the court:

"As seen by the terms of the third section of the act, the grant is one in presenti; that is, it purports to pass a present title to the lands designated by alternate sections. * * * The language of the statute is that 'there be, and hereby is, granted' to the company every alternate section of lands designated, which implies that the property itself passed, not any special or limited interest in it. The words also import a trans-

fer of a present title, not a promise to transfer one in the future.

54 "The route not being at the time determined, the grant was in the nature of a float and the title did not attach to any specific sections until they were capable of identification, but when once identified the title attached to them, as of the date of the grant, except as to such sections as were specifically reserved."

The grant therefore conveyed a present title subject to be defeated upon a failure to comply with the conditions subsequent, but the right of reentry was vested only in the grantor, the United States. The United States alone could declare a forfeiture.

The Northern Pacific road was never constructed via the Columbia River Valley, or coterminous with these lands.

On March 6, 1865, a map known as the Perham map and intended by the company as a map of general route of the road was forwarded to the Secretary of the Interior by the president of the company, together with a letter, in which the president said:

"Under authority of the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink the general line of this railroad from a point on Lake Superior in the State of Wisconsin to a point on Puget Sound in Washington Territory, via the Columbia River, adopted by said company as the line of its railroad, subject only to such variations as may be found necessary after more specific surveys," and requested that "the lands granted to the company be withdrawn from sale in conformity with law."

55 The map was drawn in the manner indicated in the president's letter. The line intended for the main line followed the north bank of the Columbia River to a point at or near Portland, and thence to Tacoma, on Puget Sound, where it was met by the branch line which crossed the Cascade Mountains. The map was disapproved by the Commissioner of the General Land Office, and his disapproval was affirmed by the Secretary of the Interior.

The question of the effect of this map was before this court for adjudication on March 1, 1890, in the case of *United States vs. Northern Pacific Railroad Company* (41 Fed., 842), and it was held by Judge Sawyer that the company had the right, under the act of July 2, 1864, to locate its main line by way of the Columbia River through Portland, and that the Perham map was a map of general location, and that the

failure of the Secretary of the Interior to give notice thereupon of the withdrawal of the lands from preemption, sale, etc., could not affect the rights of the company, for the act itself withdrew the lands upon the filing of the map, or, as expressed in the act, "after the general route shall have been fixed," which was done by filing the map of the route selected. The court said: "The company by filing the map had indicated its line, and the grant, before uncertain, now became certain, and attached to the odd sections of the land within the 40-mile limit. No notice was required to be given by the Secretary." Citing Butts vs. Railroad Co. (119 U. S., 55).

It is urged that that decision loses its force as a precedent from the fact that the rejection of the Perham map by the Commissioner of the Land Office and by the Secretary of the Interior was not brought
56 to the attention of the court. It appears that the facts in regard to the Perham map were in that case agreed upon by the stipulation of the parties to the suit. It was stipulated that the map showed "the preliminary location of the company's railroad line from a point on Puget Sound," etc., and that "no action was taken by the Interior Department upon the map or the request accompanying it."

I am unable to perceive how the action of the officers of the Department could have affected the question that was then before the court. The matter under consideration was the action of the Northern Pacific Railroad Company, not what was done by the officers of the General Land Office.

Their action could not affect the question that was then before the court or the question that is now presented in this case.

The inquiry is whether or not the Northern Pacific Company fixed the line of its general route as early as March 6, 1865, by making and filing the Perham map. That the map when filed was unsatisfactory to the officers of the Government, or was disapproved by them, is a matter foreign to the question.

Whether or not it was a map sufficient for the purpose indicated must be determined by recourse to the map itself. The inquiry is not aided by reference to the action of the officers of the Interior Department. They were not clothed with power to prejudice the rights of the company. But when their action is further considered it appears that the extent of their disapproval was their refusal to withdraw the adjacent
57 lands from settlement. This could not prevent the withdrawal, for, as said in the decision just quoted, the law itself made the withdrawal.

The Commissioner said: "The evidence required of the route under the established ruling of the department is a connected map showing the exact location, the map indicating by flagstaffs the progress of the survey. * * * That proof is required to show the precise portions of each section or smallest legal subdivision cut by the road. * * * Now, in this view the Commissioner reports that no withdrawal should be ordered until the map of actual survey, authenticated as indicated, shall be filed in the district and general land offices."

It will thus be seen that in the estimation of the officers of the General Land Office the Perham map was insufficient, because it was not a map of the final and definite location of a surveyed road, and because it

had not also been filed by the company in the district land offices in which the lands were situate, neither of which is required by the act.

In construing this act in *Butts vs. Nor. Pac. Ry. Co.* (119 U. S., 55), Mr. Justice Field said: "The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, or from a knowledge of it, and is designated by a line on the map showing the general features of the adjacent country and the places through or by which it will pass. * * * When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or preemption the odd sections to the extent of forty miles on each side."

It is contended further that the grant to the Northern Pacific Company of July 2, 1864, is wholly superseded and canceled by the joint resolution of Congress of May 31, 1870 (16 Stats. at Large, 378), and that whatever rights that company has in the public lands it takes from the latter date, having accepted the grant contained in the joint resolution in lieu of the earlier grant.

I do not so understand the joint resolution. It begins with a recognition of the incorporation of the company under the prior act. It proceeds to confer upon the company power to mortgage its property. It expressly authorizes the company to make the change in its line by constructing the main line down the valley of the Columbia River, with power to build a branch line across the Cascade Mountains, as indicated in the Perham map. It recognizes the existence and perpetuation of the prior land grant by providing for the substitution of other lands "in the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof the amount of lands granted by Congress to said company within the limits prescribed by its charts." There is in the joint resolution other recognition of the "grants and duties" provided for in the act of incorporation, and nothing can be found indicative of a purpose to abrogate the prior act or to substitute a new and independent grant therefor.

On the 13th day of August, 1870, the company filed a second map, designating the main line by way of the north bank of the Columbia River, as in the Perham map. It was a map of definite location, and thereupon the Secretary of the Interior formally withdrew the lands and issued his notice. Whatever objection may be urged to the Perham map, it must be conceded that the map of August 13, 1870, in all respects complied with the act, and that then, if not before, the line of the Northern Pacific road became definite and fixed.

In the view I take of the law it would make no difference with the rights of the parties to this suit if the Perham map had not been filed. The grant to the Northern Pacific being prior in date to the grant to the Oregon & California, and the reservation of granted lands from the first grant being held not to refer to lands subsequently granted in aid of another road, the first grant remained prior and superior to the second, and there could be no reversal of the order of their priority, resulting either from the fact that the grantee, under the junior grant, filed its map of definite location and constructed a portion of its road before any map

was filed of the line of road under the older grant, or from the further fact that in the final construction of the Northern Pacific road no portion thereof was established upon the line either of the Perham map or the map of 1870. Congress did not offer these lands to the competition of the two companies, and it was not the intention that the more diligent of the two corporations should secure them.

I hold that the failure of the Northern Pacific to construct its road by way of the Columbia River valley, the forfeiture of its grant
60 therefor declared by Congress in 1890, and the construction by the Oregon & California Company of its road in apt time under its grant of July, 1866, are all matters foreign to the question under consideration. The fact remains that the lands in controversy were granted lands at the time the grant to the Oregon & California Company took effect. They were, therefore, not the subject of the grant to that company. When that grant was made the beneficiary thereof had full notice of the prior grant, and had reason to understand that the lands so devoted to aid the construction of the other road were not within the purview of its own grant, and were not promised it by the United States.

Under these circumstances it can not be justly said, as urged by counsel for the defendants, that the United States is now placed in the attitude of breaking faith with the Oregon & California Company.

That patents were issued to the defendant company for these lands does not affect the decision of this case upon the demurrer. The public lands of the United States are held in trust for the people, and can not be disposed of by the unauthorized acts of the agents or officers of the Government. The demurrer to the bill must be overruled.

GILBERT, *Judge*.

Mr. Daniel R. Murphy and Mr. John M. Gearin, for the plaintiff;
Mr. W. D. Fenton, Mr. L. E. Payson, for the defendants.

61 (Endorsed:) Filed September 8, 1893. R. H. Lamson, clerk.
And afterwards, to wit, on Monday, the 11th day of September, 1893, the same being the 130th judicial day of the regular April term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.
September 11, 1893.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD		
Company et al.		

Order extending time to file answer.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendants, it is ordered that said defendants be, and they are hereby, allowed until Saturday, September 16, 1893, within which to answer the bill of complaint herein.

And afterwards, to wit, on Saturday, the 16th day of September, 1893, the same being the 135th judicial day of the regular April term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

62 In the circuit court of the United States for the district of Oregon.
September 16, 1893.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD Company et al.		

Order extending time to file answer.

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and the defendants, by Mr. W. D. Fenton, of counsel, and on motion of said defendants it is ordered that they be, and they are hereby, allowed sixty days from this date in which to answer the bill herein.

And afterwards, to wit, on Friday, the 3d day of November, 1893, the same being the 29th judicial day of the regular October term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

63 In the circuit court of the United States for the district of Oregon.
November 3, 1893.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD Company et al.		

Order extending time to file answer.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendants, it is ordered that the time allowed said defendants within which to file their answer to the bill herein be, and the same is hereby, extended twenty days.

And afterwards, to wit, on Friday, the 23d day of November, 1893, the same being the 47th judicial day of the regular October term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.
November 23, 1893.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD Company et al.		

Order extending time to file answer.

64 Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendants, it is ordered that said defendants be, and they

are hereby, allowed until January 10, 1894, within which to file their answer herein.

And afterwards, to wit, on Tuesday, the 26th day of December, 1893, the same being the 73d judicial day of the regular October term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.
December 26, 1893.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD		
Company et al.		

Order extending time to file answer.

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and the defendants, by Mr. W. D. Fenton, of counsel, and, on motion of said defendants, it is ordered that the time allowed said defendants in which to file their answer herein be, and the same is hereby, extended until February 10th, 1894.

And afterwards, to wit, on Monday, the 5th day of February, 1894, the same being the 108th judicial day of the regular October term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.
February 5, 1894.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD		
Company et al.		

Order extending time to file answer.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for defendants, it is ordered that the time heretofore allowed said defendants in which to file their answer herein be, and the same is hereby, extended until March 5th, 1894.

And afterwards, to wit, on Monday, the 26th day of February, 1894, the same being the 126th judicial day of the regular October term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon. February 26, 1894.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
OREGON AND CALIFORNIA RAILROAD Co.)		

Order extending time to file answer.

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States attorney, and the defendants, by Mr. W. D. Fenton, of

counsel, and on motion of said defendants it is ordered that said defendants be, and they are hereby, allowed until Monday, April 2, 1894, in which to file their answer herein.

And afterwards, to wit, on Saturday, the 31st day of March, 1894, the same being the 155th judicial day of the regular October term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

67 In the circuit court of the United States for the district of Oregon. March 31, 1894.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD Company et al.		

Order extending time to file answer.

Now, at this day, on motion of Mr. Daniel R. Murphy, U. S. attorney, it is ordered that the defendants herein be, and they are hereby, required to make answer to the bill of complaint herein on or before Monday, April 9, 1894.

And afterwards, to wit, on Friday, the 13th day of April, 1894, the same being the 5th judicial day of the regular April term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

68 In the circuit court of the United States for the district of Oregon. April 13, 1894.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON & CALIFORNIA RAILROAD Company et al.		

Order extending time to file answer.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendants, it is ordered that this cause be, and the same is hereby, continued until May , 1894.

And afterwards, to wit, on Friday, the 4th day of May, 1894, the same being the 23d judicial day of the regular April term of said court, present, the Honorable Charles B. Bellinger, United States district judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon. May 4, 1894.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD Co. et al.		

Order extending time to file answer.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendants, it is ordered that the time to answer the bill herein be, and the same is hereby, extended to Monday, June 4, 1894.

And afterwards, to wit, on Friday, the 1st day of June, 1894, the same being the 47th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon,
June 1, 1894.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD CO.		
et al.		

Order extending time to file answer.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendants, it is ordered that the defendants herein be, and they are hereby, allowed until Monday, June 18, 1894, in which to file their answer herein.

And afterwards, to wit, on Friday, the 15th day of June, 1894, the same being the 59th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

70 In the circuit court of the United States for the district of Oregon,
June 15, 1894.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
OREGON AND CALIFORNIA RAILROAD CO.		
et al.		

Order extending time to file answer.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendants, it is ordered that the defendants be, and they are hereby, allowed until Monday, June 25, 1894, in which to file their answer herein.

And afterwards, to wit, on the 25th day of June, 1894, there was duly filed in said court an answer, in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

UNITED STATES OF AMERICA, COMPLAINANT,	}	In equity.
<i>against</i>		
THE OREGON AND CALIFORNIA RAILROAD COMPANY, JOHN A. HURLBURT, and THOMAS L. EVANS,		
defendants.		

71 *Answer to bill of complaint.*

The joint and several answer of The Oregon and California Railroad Company, John A. Hurlburt, and Thomas L. Evans to the bill of complaint in this suit as amended.

The Oregon and California Railroad Company, John A. Hurlburt, and Thomas L. Evans, defendants in the above-entitled suit, saving and

reserving to themselves, and each of them, all benefit or advantage of exception, or otherwise, to which they, or either of them, may be or become entitled by reason of the many errors, uncertainties, and insufficiencies of the bill of complaint of the complainant herein as amended, for answer thereto, or to so much and such parts or portions thereof as it may be material or necessary for them, or either of them, to answer unto, answering say:

First. They jointly and severally aver that the map alleged in the third paragraph of the said bill to have been received on March 6, 1865, by the then Secretary of the Interior from Josiah Perham was never accepted by the Secretary of the Interior or the Commissioner of the General Land Office; but, on the contrary, was, for good and sufficient cause, disapproved and rejected by them, and each of them, and said map was wholly ineffective as a map of general route or definite location, or for any purpose whatsoever; and that after its rejection by the said Secretary of the Interior and the Commissioner of the General Land

Office it was not regarded or treated by the said Northern Pacific Railroad Company, or by the Secretary of the Interior, or the Commissioner of the General Land Office, or the Interior Department of the United States as a valid map for any purpose, and that no subsequent action was ever had or taken as to said map either by said company, or the Secretary of the Interior, or the Commissioner of the General Land Office, or the Interior Department of the United States.

Second. They jointly and severally aver that the two maps referred to in said third paragraph of said bill, as two maps of general route, which on August 4, 1870, were presented to the then Secretary of the Interior by Edwin F. Johnson, never became or were maps of definite location of the Northern Pacific Railroad, or of any line of railroad of the said Northern Pacific Railroad Company, or anything more than maps of general route, and they jointly and severally deny that any map of definite location of the said Northern Pacific Railroad, or of any line of railroad of the Northern Pacific Railroad Company, between Wallula, Washington, and Portland, Oregon, or its vicinity, or opposite the lands in controversy in this suit, or any thereof, was ever presented to or filed with the Secretary of the Interior, or the Commissioner of the General Land Office, or the Interior Department of the United States, and they jointly and severally deny that any withdrawal of indemnity lands was ever made on account of said railroad or railroad line between the said points, or opposite the said lands, or at any of them.

Third. These defendants further, jointly and severally, deny that all the lands in controversy in this suit were within the place limits of the proposed line of railroad of the Northern Pacific Railroad Company, as designated by the maps of August 4, 1870, hereinbefore referred to, or that all of such lands were within the limits of any withdrawal, duly or properly ordered in respect thereof, and they are advised and believe, and therefore aver, that the said Northern Pacific Railroad Company was not and never became in anywise entitled or to a withdrawal of any lands within the State of Oregon opposite the line shown on said maps, or any part thereof, which were distant more than twenty miles from the proposed line of railroad as indicated upon said map. They therefore jointly and severally deny that any lands in controversy

in this suit which were distant more than twenty miles from the said proposed line of railroad could be within any place limits of said railroad, or could be lawfully withdrawn in respect thereof, and they further aver the fact to be that there have been patented to the said Oregon and California Railroad Company, under its claim thereto under the act of July 25, 1866, referred to in the said bill, about 56,000 acres of said lands distant more than twenty miles from said line of general route of said Northern Pacific Railroad.

Fourth. These defendants, further answering, jointly and severally deny that the ministerial officers of the complainant acted in anywise erroneously or contrary to law in issuing patents to the defendant, the Oregon and California Railroad Company, for the lands, or any of the lands, described in said bill, either under the facts as stated in said bill or otherwise howsoever, and they deny that said patents, or any of them, are void either in whole or in part, or should be so declared, or should be canceled as to the Oregon and California Railroad Company, the grantee therein, or otherwise.

Fifth. These defendants, John A. Hurlburt and Thomas L. Evans, jointly and severally, deny that they were chargeable with constructive notice of the several acts of Congress referred to in said bill, and jointly and severally deny that under said acts of Congress and the acts and doing of the said railroad company no title could pass to said Hurlburt and Evans, and jointly and severally deny that any patent or patents referred to in said bill should be canceled as to them or either of them.

Sixth. And the said defendant, the Oregon and California Railroad Company, further answering, says that, besides the land sold to its codefendants, John A. Hurlburt and Thomas L. Evans, as alleged in the said bill, this defendant from time to time before complainant's demand for reconveyance of any of the lands involved in this suit sold to divers other persons and parties, at the times stated in the schedule marked A attached to and forming part of this answer, divers parts and portions of the lands in controversy in this suit as stated in said schedule, and the persons and parties to whom such sales have been respectively made, purchased the several parts and portions of such lands so sold to them in good faith for full and valuable consideration and without notice or knowledge of any alleged defect in the title of said Oregon & California Railroad Company to said lands, or of any claim of

the United States thereto, or in respect thereof, and that such purchasers or their transferees, or a large portion thereof, have entered into actual possession of said lands, and have remained in possession thereof to this date, and made valuable and permanent improvements thereon.

And this defendant further alleges that all such sales were made prior to the time of the assertion by the complainant of any claim that the lands in controversy in this suit had not passed to and become the property of this defendant, under and by virtue of the said act of July 25th, 1866, referred to in said bill.

Seventh. And these defendants, further answering, jointly and severally, insist that none of the matters in said complainant's bill of complaint mentioned and set forth are matters in respect of which said complainant is entitled to relief in a court of equity, and they therefore ask to have

the same benefit of defense thereto as if they had demurrer to said bill.

Wherefore the defendants, jointly and severally, humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

[SEAL] OREGON AND CALIFORNIA RAILROAD COMPANY,
By R. KOEHLER, *Second Vice-President*.

OREGON AND CALIFORNIA RAILROAD COMPANY,
By GEO. H. ANDREWS, *Its Secretary*.

Attest:

GEO. H. ANDREWS, *Secretary O. & C. R. R. Co.*,
And JOHN A. HURLBURT,
THOMAS L. EVANS,

Defendants above Named.

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E. C. BRONAUGH,
L. L. McARTHUR,
W. D. FENTON,
E. C. BRONAUGH, JR.,

Solicitors of said Defendants.

BRONAUGH, McARTHUR,
FENTON & BRONAUGH,

Counsel for said Defendants.

STATE OF OREGON,

County of Multnomah, District of Oregon, ss:

I, R. Koehler, and I, Geo. H. Andrews, being first duly sworn, each for myself and not for the other, on my oath do depose and say, that I, Geo. H. Andrews, and secretary, and I, R. Koehler, and second vice-president of the Oregon & California Railroad Company, one of the defendants named in the foregoing answer, that I have read the foregoing answer and know its contents; that so much of the allegations of said answer as are not stated upon information and belief are true; that as to the matters and things therein stated upon information and belief, I verily believe the same to be true.

R. KOEHLER,

GEO. H. ANDREWS,

Subscribed and sworn to before me this 25th day of June, A. D. 1894.

[SEAL.]

W. D. FENTON,
Notary Public for Oregon.

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EXHIBIT A. (To answer.)

Sold Oct.	17, 1889,	part of sec. 35, Tp. 1 S., R. 1 E.,	3.87 acres.
" July	31, 1874,	" 11, " 1 S., " 2 E.,	37.66 "
" June	7, 1878,	" 9, " 1 S., " 2 E.,	40 "
" July	31, 1874,	" 15, " 1 S., " 2 E.,	40 "
" Sept.	18, 1875,	" 23, " 1 S., " 2 E.,	47.48 "
" April	1, 1879,	" 23, " 1 S., " 2 E.,	40 "
" July	3, 1879,	" 23, " 1 S., " 2 E.,	292.21 "
" Dec.	5, 1881,	" 27, " 1 S., " 2 E.,	40 "
" May	21, 1879,	" 27, " 1 S., " 2 E.,	80 "
" May	29, 1875,	" 29, " 1 S., " 2 E.,	74.30 "
" Sept.	19, 1874,	" 29, " 1 S., " 2 E.,	62 "

EXHIBIT A. (To answer.)—Continued.

Sold July 31, 1874, part of sec.	5, Tp. 1 S., R. 3 E.,	205.92 acres.
" April 22, 1878, "	5, " 1 S., " 3 E.,	41.50 "
" May 10, 1889, "	5, " 1 S., " 3 E.,	5.43 "
" July 31, 1874, "	7, " 1 S., " 3 E.,	80 "
" Nov. 10, 1874, "	13, " 1 S., " 3 E.,	40 "
" Nov. 22, 1871, "	15, " 1 S., " 3 E.,	80 "
" Jan. 19, 1878, "	17, " 1 S., " 3 E.,	2.95 "
" Jan. 19, 1878, "	17, " 1 S., " 3 E.,	3.23 "
" Sept. 11, 1889, "	17, " 1 S., " 3 E.,	21.45 "
" July 22, 1889, "	19, " 1 S., " 3 E.,	8.14 "
" Oct. 12, 1878, "	21, " 1 S., " 3 E.,	40 "
" Aug. 28, 1878, "	21, " 1 S., " 3 E.,	80 "
" Feby. 28, 1879, "	21, " 1 D., " 3 E.,	80 "
" Aug. 31, 1882, "	21, " 1 S., " 3 E.,	102.40 "
" Feby. 26, 1889, "	21, " 1 S., " 3 E.,	40 "
" Aug. 28, 1879, "	23, " 1 S., " 3 E.,	80 "
" Nov. 6, 1885, "	25, " 1 S., " 3 E.,	10 "
" July 30, 1879, "	25, " 1 S., " 3 E.,	24.76 "
" June 28, 1879, "	25, " 1 S., " 3 E.,	80 "
" June 14, 1879, "	25, " 1 S., " 3 E.,	160 "
" June 24, 1874, "	25, " 1 S., " 3 E.,	40 "
" Mar. 29, 1882, "	25, " 1 S., " 3 E.,	40 "
" Aug. 30, 1879, "	27, " 1 S., " 3 E.,	80 "
" Sept. 15, 1885, "	27, " 1 S., " 3 E.,	80 "
" Feby. 5, 1878, "	27, " 1 S., " 3 E.,	160 "
" Feby. 25, 1889, "	29, " 1 S., " 3 E.,	40 "
" Jan. 9, 1889, "	29, " 1 S., " 3 E.,	40 "
" Oct. 23, 1888, "	29, " 1 S., " 3 E.,	12.20 "
" July 3, 1882, "	29, " 1 S., " 3 E.,	52.20 "
" Aug. 7, 1882, "	29, " 1 S., " 3 E.,	40 "
" April 30, 1883, "	29, " 1 S., " 3 E.,	40 "
" June 14, 1882, "	29, " 1 S., " 3 E.,	52.20 "
" April 11, 1886, "	29, " 1 S., " 3 E.,	80 "
" Feby. 16, 1876, "	29, " 1 S., " 3 E.,	35.09 "
" Aug. 10, 1882, "	31, " 1 S., " 3 E.,	80 "
" Dec. 2, 1889, "	31, " 1 S., " 3 E.,	92.90 "
" Dec. 16, 1879, "	33, " 1 S., " 3 E.,	40 "
" Dec. 30, 1881, "	33, " 1 S., " 3 E.,	80 "
" Aug. 21, 1880, "	33, " 1 S., " 3 E.,	40 "
" Dec. 31, 1886, "	33, " 1 S., " 3 E.,	120 "
" Dec. 31, 1886, "	35, " 1 S., " 3 E.,	400 "
" July 26, 1879, "	1, " 1 S., " 4 E.,	39.44 "
" July 25, 1882, "	1, " 1 S., " 4 E.,	39.06 "
" Aug. 22, 1879, "	1, " 1 S., " 4 E.,	78.69 "
" July 23, 1883, "	1, " 1 S., " 4 E.,	40 "
" June 10, 1891, "	1, " 1 S., " 4 E.,	40 "
" Mar. 9, 1882, "	1, " 1 S., " 4 E.,	80 "
" June 9, 1881, "	1, " 1 S., " 4 E.,	40 "
" Aug. 17, 1889, "	1, " 1 S., " 4 E.,	200 "
" Nov. 5, 1879, "	3, " 1 S., " 4 E.,	76.96 "
" Feby. 16, 1876, "	3, " 1 S., " 4 E.,	77.92 "
" Mar. 10, 1881, "	3, " 1 S., " 4 E.,	80 "
" Aug. 14, 1883, "	3, " 1 S., " 4 E.,	160 "
" Jan. 7, 1880, "	3, " 1 S., " 4 E.,	240 "
" Feby. 16, 1876, "	11, " 1 S., " 4 E.,	80 "
" Aug. 17, 1876, "	11, " 1 S., " 4 E.,	40 "
" June 9, 1885, "	11, " 1 S., " 4 E.,	40 "
" July 7, 1886, "	11, " 1 S., " 4 E.,	40 "
" Sept. 15, 1891, "	11, " 1 S., " 4 E.,	40 "
" Aug. 29, 1889, "	11, " 1 S., " 4 E.,	40 "
" Sept. 29, 1884, "	11, " 1 S., " 4 E.,	40 "
" Feby. 19, 1883, "	11, " 1 S., " 4 E.,	200 "
" Feby. 19, 1883, "	13, " 1 S., " 4 E.,	120 "
" May 24, 1889, "	13, " 1 S., " 4 E.,	40 "
" July 26, 1888, "	13, " 1 S., " 4 E.,	40 "
" May 25, 1888, "	13, " 1 S., " 4 E.,	40 "
" May 25, 1888, "	13, " 1 S., " 4 E.,	40 "
" May 25, 1888, "	13, " 1 S., " 4 E.,	40 "

EXHIBIT A. (To answer.)—Continued.

79	Sold Sept. 3, 1888, part of sec. 13, Tp. 1 S., R. 4 E.,	80	acres.
	" Oct. 26, 1882, " 13, " 1 S., " 4 E.,	80	"
	" Nov. 27, 1876, " 13, " 1 S., " 4 E.,	160	"
	" June 8, 1885, " 15, " 1 S., " 4 E.,	40	"
	" July 3, 1891, " 15, " 1 S., " 4 E.,	120	"
	" Aug. 28, 1889, " 15, " 1 S., " 4 E.,	40	"
	" Feby. 5, 1881, " 15, " 1 S., " 4 E.,	40	"
	" July 2, 1881, " 15, " 1 S., " 4 E.,	40	"
	" April 30, 1890, " 15, " 1 S., " 4 E.,	40	"
	" May 24, 1882, " 15, " 1 S., " 4 E.,	160	"
	" Mar. 29, 1883, " 17, " 1 S., " 4 E.,	160	"
	" Jan. 9, 1891, " 23, " 1 S., " 4 E.,	80	"
	" Sept. 2, 1889, " 23, " 1 S., " 4 E.,	40	"
	" Mar. 15, 1892, " 23, " 1 S., " 4 E.,	80	"
	" April 29, 1891, " 23, " 1 S., " 4 E.,	80	"
	" Aug. 1, 1883, " 23, " 1 S., " 4 E.,	40	"
	" Aug. 1, 1883, " 23, " 1 S., " 4 E.,	40	"
	" Mar. 15, 1892, " 25, " 1 S., " 4 E.,	40	"
	" Jan. 21, 1891, " 25, " 1 S., " 4 E.,	40	"
	" Jan. 14, 1891, " 25, " 1 S., " 4 E.,	80	"
	" July 24, 1892, " 25, " 1 S., " 4 E.,	80	"
	" April 28, 1884, " 25, " 1 S., " 4 E.,	80	"
	" Aug. 31, 1891, " 25, " 1 S., " 4 E.,	80	"
	" Dec. 29, 1883, " 5, " 1 S., " 5 E.,	34	"
	" Nov. 12, 1883, " 5, " 1 S., " 5 E.,	34.22	"
	" April 18, 1882, " 5, " 1 S., " 5 E.,	40	"
	" Mar. 11, 1879, " 5, " 1 S., " 5 E.,	40	"
	" July 2, 1881, " 5, " 1 S., " 5 E.,	40	"
	" Mar. 18, 1890, " 5, " 1 S., " 5 E.,	40	"
	" Sept. 8, 1881, " 7, " 1 S., " 5 E.,	40	"
	" Aug. 29, 1881, " 7, " 1 S., " 5 E.,	40	"
	" Aug. 4, 1881, " 7, " 1 S., " 5 E.,	80	"
	" Nov. 20, 1880, " 7, " 1 S., " 5 E.,	78.54	"
	" Dec. 31, 1889, " 7, " 1 S., " 5 E.,	316.82	"
	" Aug. 4, 1881, " 7, " 1 S., " 5 E.,	80	"
	" Dec. 6, 1891, " 17, " 1 S., " 5 E.,	120	"
	" Dec. 6, 1890, " 17, " 1 S., " 5 E.,	120	"
	" Dec. 6, 1890, " 17, " 1 S., " 5 E.,	120	"
	" Dec. 6, 1890, " 17, " 1 S., " 5 E.,	160	"
	" Dec. 6, 1890, " 17, " 1 S., " 5 E.,	120	"
	" Nov. 10, 1890, " 19, " 1 S., " 5 E.,	80	"
	" May 5, 1891, " 19, " 1 S., " 5 E.,	80	"
	" Jan. 13, 1891, " 19, " 1 S., " 5 E.,	40	"
	" May 5, 1891, " 19, " 1 S., " 5 E.,	40	"
	" Dec. 13, 1876, " 19, " 1 S., " 5 E.,	119.23	"
	" Dec. 31, 1890, " 19, " 1 S., " 5 E.,	119.85	"
	" Feby. 20, 1884, " 19, " 1 S., " 5 E.,	40	"
	" May 30, 1883, " 19, " 1 S., " 5 E.,	40	"
	" Jan. 28, 1891, " 19, " 1 S., " 5 E.,	80	"
	" Oct. 11, 1884, " 21, " 1 S., " 5 E.,	160	"
	" Dec. 31, 1889, " 21, " 1 S., " 5 E.,	160	"
	" June 16, 1890, " 29, " 1 S., " 5 E.,	38	"
	" Nov. 17, 1886, " 29, " 1 S., " 5 E.,	2	"
	" Dec. 13, 1890, " 29, " 1 S., " 5 E.,	80	"
	" Mar. 31, 1891, " 29, " 1 S., " 5 E.,	40	"
	" Jan. 10, 1890, " 29, " 1 S., " 5 E.,	80	"
	" April 9, 1889, " 29, " 1 S., " 5 E.,	40	"
	" May 24, 1879, " 29, " 1 S., " 5 E.,	80	"
	" Jan. 15, 1890, " 29, " 1 S., " 5 E.,	80	"
	" Feby. 6, 1878, " 31, " 1 S., " 5 E.,	40	"
	" Nov. 7, 1882, " 31, " 1 S., " 5 E.,	439.95	"
	" Nov. 7, 1882, " 33, " 1 S., " 5 E.,	160	"
	" Nov. 19, 1883, " 33, " 1 S., " 5 E.,	80	"
	" Sept. 28, 1883, " 33, " 1 S., " 5 E.,	40	"
	" Sept. 17, 1883, " 33, " 1 S., " 5 E.,	40	"
	" Nov. 6, 1889, " 33, " 1 S., " 5 E.,	80	"
	" May 8, 1891, " 29, " 1 S., " 5 E.,	160	"
	" Dec. 16, 1872, " 3, " 2 S., " 1 E.,	16.79	"

EXHIBIT A. (To answer.)—Continued.

Sold	Oct. 19, 1880, part of	sec. 11, Tp. 2 S., R. 4 E.,	40	acres.
"	Mar. 24, 1879,	" 11, " 2 S., " 4 E.,	80	"
"	Jan. 26, 1883,	" 11, " 2 S., " 4 E.,	80	"
"	May 16, 1883,	" 11, " 2 S., " 4 E.,	40	"
"	Feby. 9, 1881,	" 11, " 2 S., " 4 E.,	40	"
"	July 19, 1881,	" 13, " 2 S., " 4 E.,	120	"
"	Aug. 17, 1876,	" 13, " 2 S., " 4 E.,	40	"
"	Nov. 4, 1873,	" 13, " 2 S., " 4 E.,	40	"
"	Dec. 16, 1872,	" 13, " 2 S., " 4 E.,	40	"
"	Sept. 13, 1877,	" 13, " 2 S., " 4 E.,	80	"
"	Sept. 28, 1883,	" 13, " 2 S., " 4 E.,	40	"
"	Dec. 15, 1874,	" 13, " 2 S., " 4 E.,	40	"
"	Oct. 3, 1876,	" 15, " 2 S., " 4 E.,	40	"
"	Sept. 23, 1889,	" 15, " 2 S., " 4 E.,	10	"
"	May 10, 1890,	" 15, " 2 S., " 4 E.,	240	"
"	Oct. 22, 1889,	" 19, " 2 S., " 4 E.,	40	"
"	June 2, 1884,	" 15, " 2 S., " 4 E.,	80	"
"	July 17, 1884,	" 15, " 2 S., " 4 E.,	80	"
"	Mar. 25, 1889,	" 15, " 2 S., " 4 E.,	80	"
"	Oct. 9, 1889,	" 15, " 2 S., " 4 E.,	10	"
"	May 26, 1884,	" 17, " 2 S., " 4 E.,	100	"
"	Mar. 20, 1873,	" 17, " 2 S., " 4 E.,	40	"
"	Nov. 27, 1872,	" 17, " 2 S., " 4 E.,	40	"
"	Jan. 19, 1878,	" 19, " 2 S., " 4 E.,	40	"
"	Nov. 27, 1872,	" 19, " 2 S., " 4 E.,	46.36	"
"	Dec. 20, 1871,	" 21, " 2 S., " 4 E.,	120	"
"	May 31, 1883,	" 21, " 2 S., " 4 E.,	40	"
"	Aug. 29, 1882,	" 23, " 2 S., " 4 E.,	80	"
"	May 5, 1890,	" 23, " 2 S., " 4 E.,	40	"
"	May 12, 1884,	" 23, " 2 S., " 4 E.,	80	"
"	Mar. 7, 1874,	" 23, " 2 S., " 4 E.,	10	"
"	July 28, 1882,	" 23, " 2 S., " 4 E.,	80	"
"	July 1, 1889,	" 23, " 2 S., " 4 E.,	40	"
"	Jan. 16, 1873,	" 25, " 2 S., " 4 E.,	40	"
"	Mar. 21, 1890,	" 25, " 2 S., " 4 E.,	40	"
"	June 30, 1891,	" 25, " 2 S., " 4 E.,	40	"
"	July 1, 1891,	" 25, " 2 S., " 4 E.,	10	"
"	May 13, 1890,	" 25, " 2 S., " 4 E.,	40	"
"	May 15, 1890,	" 25, " 2 S., " 4 E.,	40	"
"	Feby. 28, 1890,	" 25, " 2 S., " 4 E.,	80	"
"	Feby. 24, 1890,	" 25, " 2 S., " 4 E.,	80	"
"	Aug. 17, 1888,	" 27, " 2 S., " 4 E.,	160	"
"	May 8, 1890,	" 27, " 2 S., " 4 E.,	80	"
"	Aug. 30, 1890,	" 27, " 2 S., " 4 E.,	160	"
"	Aug. 1, 1883,	" 33, " 2 S., " 4 E.,	40	"
"	Feby. 8, 1883,	" 33, " 2 S., " 4 E.,	80	"
"	Nov. 26, 1881,	" 33, " 2 S., " 4 E.,	40	"
"	May 16, 1883,	" 35, " 2 S., " 4 E.,	80	"
"	Aug. 26, 1884,	" 1, " 2 S., " 5 E.,	160	"
"	Aug. 26, 1884,	" 1, " 2 S., " 5 E.,	158.11	"
"	Dec. 24, 1890,	" 3, " 2 S., " 5 E.,	635.36	"
"	Nov. 7, 1882,	" 5, " 2 S., " 5 E.,	320	"
"	Oct. 15, 1883,	" 5, " 2 S., " 5 E.,	160	"
"	Oct. 21, 1889,	" 5, " 2 S., " 5 E.,	40	"
"	April 29, 1891,	" 5, " 2 S., " 5 E.,	80	"
"	Nov. 16, 1891,	" 7, " 2 S., " 5 E.,	40	"
"	May 13, 1891,	" 7, " 2 S., " 5 E.,	162.33	"
"	Jan. 3, 1872,	" 9, " 2 S., " 5 E.,	40	"
"	Oct. 8, 1889,	" 9, " 2 S., " 5 E.,	200	"
"	Oct. 6, 1880,	" 9, " 2 S., " 5 E.,	80	"
"	Sept. 26, 1889,	" 11, " 2 S., " 5 E.,	160	"
"	June 9, 1890,	" 11, " 2 S., " 5 E.,	40	"
"	June 11, 1890,	" 11, " 2 S., " 5 E.,	40	"
"	Oct. 9, 1889,	" 11, " 2 S., " 5 E.,	120	"
"	May 19, 1890,	" 11, " 2 S., " 5 E.,	40	"
"	May 28, 1888,	" 11, " 2 S., " 5 E.,	40	"
"	Aug. 17, 1879,	" 11, " 2 S., " 5 E.,	40	"
"	Oct. 1, 1881,	" 11, " 2 S., " 5 E.,	80	"

EXHIBIT A. (To answer.)—Continued.

81	Sold April 14, 1884,	part	11, Tp. 2 S., R. 5 E.,	80	acres.
	" Feby. 14, 1883,	"	13, " " " " " " " " " "	160	"
	" Oct. 25, 1882,	"	13, " " " " " " " " " "	240	"
	" June 10, 1889,	"	15, " " " " " " " " " "	40	"
	" June 12, 1890,	"	15, " " " " " " " " " "	80	"
	" June 13, 1890,	"	15, " " " " " " " " " "	80	"
	" Mar. 6, 1891,	"	15, " " " " " " " " " "	80	"
	" Oct. 18, 1880,	"	17, " " " " " " " " " "	80	"
	" Sept. —, 1875,	"	17, " " " " " " " " " "	80	"
	" June 8, 1875,	"	17, " " " " " " " " " "	40	"
	" Nov. 8, 1889,	"	17, " " " " " " " " " "	40	"
	" Nov. 8, 1889,	"	17, " " " " " " " " " "	40	"
	" Mar. 27, 1874,	"	19, " " " " " " " " " "	40	"
	" Nov. 23, 1876,	"	19, " " " " " " " " " "	40	"
	" May 25, 1875,	"	19, " " " " " " " " " "	40	"
	" Mar. 12, 1890,	"	19, " " " " " " " " " "	120	"
	" Mar. 12, 1890,	"	19, " " " " " " " " " "	197.10	"
	" Oct. 2, 1889,	"	19, " " " " " " " " " "	36.93	"
	" Mar. 17, 1875,	"	19, " " " " " " " " " "	36.76	"
	" Feby. 16, 1876,	"	19, " " " " " " " " " "	37.27	"
	" Mar. 21, 1890,	"	21, " " " " " " " " " "	80	"
	" June 12, 1890,	"	21, " " " " " " " " " "	80	"
	" Sept. 1875,	"	21, " " " " " " " " " "	160	"
	" Mar. 31, 1883,	"	23, " " " " " " " " " "	40	"
	" Sept. 23, 1889,	"	23, " " " " " " " " " "	40	"
	" Nov. 2, 1885,	"	23, " " " " " " " " " "	80	"
	" Oct. 2, 1883,	"	23, " " " " " " " " " "	40	"
	" Jan'y. 4, 1884,	"	23, " " " " " " " " " "	40	"
	" Sept. 18, 1889,	"	23, " " " " " " " " " "	200	"
	" Sept. 1875,	"	23, " " " " " " " " " "	80	"
	" Nov. 23, 1888,	"	25, " " " " " " " " " "	160	"
	" Nov. 2, 1882,	"	25, " " " " " " " " " "	160	"
	" Nov. 21, 1884,	"	25, " " " " " " " " " "	80	"
	" Nov. 18, 1885,	"	25, " " " " " " " " " "	80	"
	" Sept. 14, 1889,	"	25, " " " " " " " " " "	160	"
	" Sept. 14, 1889,	"	27, " " " " " " " " " "	80	"
	" Mar. 7, 1883,	"	27, " " " " " " " " " "	80	"
	" Oct. 31, 1884,	"	27, " " " " " " " " " "	80	"
	" Dec. 6, 1882,	"	27, " " " " " " " " " "	40	"
	" June 17, 1891,	"	27, " " " " " " " " " "	40	"
	" July 28, 1890,	"	27, " " " " " " " " " "	80	"
	" June 1, 1891,	"	27, " " " " " " " " " "	40	"
85	" Mar. 22, 1889,	"	27, " " " " " " " " " "	40	"
	" July 26, 1889,	"	27, " " " " " " " " " "	40	"
	" June 2, 1890,	"	27, " " " " " " " " " "	40	"
	" Sept. —, 1875,	"	27, " " " " " " " " " "	80	"
	" June 9, 1880,	"	29, " " " " " " " " " "	40	"
	" Sept. 30, 1889,	"	29, " " " " " " " " " "	40	"
	" Jan'y. 30, 1874,	"	29, " " " " " " " " " "	40	"
	" June 8, 1888,	"	29, " " " " " " " " " "	40	"
	" Mar. 23, 1883,	"	29, " " " " " " " " " "	40	"
	" Mar. 23, 1883,	"	29, " " " " " " " " " "	80	"
	" Sept. 20, 1876,	"	29, " " " " " " " " " "	40	"
	" Jan'y. 5, 1875,	"	29, " " " " " " " " " "	40	"
	" Oct. 29, 1889,	"	29, " " " " " " " " " "	40	"
	" Oct. 29, 1889,	"	29, " " " " " " " " " "	40	"
	" May 15, 1889,	"	29, " " " " " " " " " "	120	"
	" Jan'y. 2, 1877,	"	31, " " " " " " " " " "	40	"
	" Oct. 8, 1888,	"	31, " " " " " " " " " "	80	"
	" Nov. 26, 1889,	"	31, " " " " " " " " " "	113.11	"
	" Dec. 4, 1888,	"	31, " " " " " " " " " "	160	"
	" Mar. 12, 1890,	"	31, " " " " " " " " " "	233.71	"
	" Nov. 11, 1889,	"	33, " " " " " " " " " "	80	"
	" Jan'y. 20, 1891,	"	33, " " " " " " " " " "	80	"
	" Jan'y. 20, 1891,	"	33, " " " " " " " " " "	40	"
	" Jan'y. 20, 1891,	"	33, " " " " " " " " " "	80	"
	" Sept. 22, 1888,	"	33, " " " " " " " " " "	80	"
	" Sept. 24, 1888,	"	33, " " " " " " " " " "	40	"

EXHIBIT A. (To answer.)—Continued.

Sold	part	33, Tp. 2 S., R. 5 E.,	80	acres.
Sept. 22, 1888,		33, " 2 S., " 5 E.,	80	"
" Feby. 13, 1891,	"	33, " 2 S., " 5 E.,	80	"
" Feby. 16, 1891,	"	33, " 2 S., " 5 E.,	40	"
" Aug. 19, 1889,	"	35, " 2 S., " 5 E.,	74.16	"
" Jan. 19, 1878,	"	15, " 3 S., " 1 E.,	22.24	"
" Nov. 27, 1872,	"	15, " 3 S., " 1 E.,	30.25	"
" Aug. 29, 1876,	"	25, " 3 S., " 1 E.,	35.42	"
" Sept. 24, 1877,	"	35, " 3 S., " 2 E.,	80	"
" Oct. 24, 1882,	"	1, " 3 S., " 2 E.,	78.52	"
" July 31, 1874,	"	1, " 3 S., " 2 E.,	40	"
" Aug. 7, 1882,	"	1, " 3 S., " 2 E.,	40	"
" Mar. 20, 1889,	"	1, " 3 S., " 2 E.,	40	"
" April 25, 1890,	"	11, " 3 W., " 2 E.,	40	"
" Aug. 3, 1878,	"	11, " 3 S., " 2 E.,	40	"
" May 18, 1885,	"	11, " 3 S., " 2 E.,	40	"
" June 13, 1885,	"	11, " 3 S., " 2 E.,	40	"
" Sept. 4, 1889,	"	11, " 3 S., " 2 E.,	90.08	"
" Apr. 23, 1885,	"	11, " 3 S., " 2 E.,	40	"
" Apr. 20, 1885,	"	14, " 3 S., " 2 E.,	37.99	"
" Apr. 8, 1885,	"	11, " 3 S., " 2 E.,	40	"
" May 14, 1874,	"	11, " 3 S., " 2 E.,	160	"
" Apr. 13, 1891,	"	11, " 3 S., " 2 E.,	40	"
" June 20, 1883,	"	13, " 3 S., " 2 E.,	80	"
" Feb. 19, 1875,	"	13, " 3 S., " 2 E.,	80	"
" Nov. 27, 1872,	"	13, " 3 S., " 2 E.,	160	"
" Jan. 13, 1879,	"	13, " 3 S., " 2 E.,	160	"
" June 4, 1877,	"	15, " 3 S., " 2 E.,	24.76	"
" May 21, 1883,	"	17, " 3 S., " 2 E.,	26.01	"
" Apr. 12, 1876,	"	17, " 3 S., " 2 E.,	30.91	"
" Mar. 18, 1876,	"	17, " 3 S., " 2 E.,	41	"
" June 14, 1883,	"	17, " 3 S., " 2 E.,	30.16	"
" July 9, 1890,	"	17, " 3 S., " 2 E.,	40	"
" Feb. 16, 1883,	"	25, " 3 S., " 2 E.,	120	"
" Apr. 17, 1883,	"	29, " 3 S., " 2 E.,	80	"
" Sept. 22, 1883,	"	29, " 3 S., " 2 E.,	160	"
" Nov. 27, 1872,	"	31, " 3 S., " 2 E.,	40	"
" Sept. 10, 1883,	"	31, " 3 S., " 2 E.,	40	"
" July 12, 1883,	"	31, " 3 S., " 2 E.,	80	"
" Sept. 28, 1883,	"	31, " 3 S., " 2 E.,	79.39	"
" Apr. 24, 1879,	"	31, " 3 S., " 2 E.,	78.63	"
" Feb. 23, 1885,	"	31, " 3 S., " 2 E.,	40	"
" Mar. 23, 1878,	"	31, " 3 S., " 2 E.,	40	"
" May 22, 1879,	"	1, " 3 S., " 3 E.,	39.22	"
" Dec. 31, 1890,	"	1, " 3 S., " 3 E.,	45.19	"
" Dec. 3, 1880,	"	1, " 3 S., " 3 E.,	81.10	"
" Dec. 15, 1881,	"	3, " 3 S., " 3 E.,	32.88	"
" Sept. 14, 1881,	"	5, " 3 S., " 3 E.,	38.58	"
" July 17, 1886,	"	5, " 3 S., " 3 E.,	38.53	"
" Aug. 26, 1881,	"	5, " 3 S., " 3 E.,	52.92	"
" July 31, 1874,	"	5, " 3 S., " 3 E.,	17.25	"
" Oct. 6, 1884,	"	7, " 3 S., " 3 E.,	54.14	"
" Mar. 20, 1892,	"	7, " 3 S., " 3 E.,	53.94	"
" Dec. 1, 1883,	"	7, " 3 S., " 3 E.,	122.65	"
" Apr. 25, 1890,	"	7, " 3 S., " 3 E.,	45.72	"
" May 7, 1890,	"	7, " 3 S., " 3 E.,	45.57	"
" Oct. 26, 1888,	"	9, " 3 S., " 3 E.,	14.86	"
" Oct. 26, 1888,	"	9, " 3 S., " 3 E.,	34.37	"
" June 17, 1878,	"	9, " 3 S., " 3 E.,	80	"
" July 31, 1874,	"	13, " 3 S., " 3 E.,	28.80	"
" July 31, 1874,	"	13, " 3 S., " 3 E.,	47.29	"
" Jan. 11, 1878,	"	13, " 3 S., " 3 E.,	40	"
" May 9, 1888,	"	13, " 3 S., " 3 E.,	39.30	"
" July 31, 1874,	"	17, " 3 S., " 3 E.,	78.36	"
" May 16, 1883,	"	19, " 3 S., " 3 E.,	80	"
" May 24, 1879,	"	23, " 3 S., " 3 E.,	4.50	"
" July 2, 1886,	"	25, " 3 S., " 3 E.,	46.95	"
" Oct. 19, 1875,	"	27, " 3 S., " 3 E.,	40	"
" July 27, 1880,	"	27, " 3 S., " 3 E.,	24	"

EXHIBIT A. (To answer.)—Continued.

Sold June 6, 1884,	part	29, Tp. 3 S., R. 3 E.,	115.31 acres.
" Mar. 8, 1883,	"	29, " 3 S., " 3 E.,	39.48 "
" Apr. 5, 1881,	"	29, " 3 S., " 3 E.,	40 "
" Mar. 5, 1880,	"	29, " 3 S., " 3 E.,	40 "
" Nov. 8, 1877,	"	29, " 3 S., " 3 E.,	40 "
" Jan. 13, 1879,	"	31, " 3 S., " 3 E.,	40 "
" Apr. 18, 1883,	"	31, " 3 S., " 3 E.,	40 "
" Apr. 18, 1878,	"	31, " 3 S., " 3 E.,	40 "
" Oct. 20, 1879,	"	31, " 3 S., " 3 E.,	40 "
" Feb. 20, 1879,	"	31, " 3 S., " 3 E.,	46.45 "
" Feb. 22, 1879,	"	31, " 3 S., " 3 E.,	46.34 "
" Sept. 21, 1889,	"	1, " 3 S., " 4 E.,	40.24 "
" Sept. 21, 1889,	"	1, " 3 S., " 4 E.,	40.69 "
" Nov. 2, 1881,	"	1, " 3 S., " 4 E.,	40 "
" Nov. 7, 1881,	"	1, " 3 S., " 4 E.,	40 "
" Jan. 30, 1890,	"	1, " 3 S., " 4 E.,	80 "
" July 31, 1874,	"	1, " 3 S., " 4 E.,	80 "
" July 31, 1874,	"	1, " 3 S., " 4 E.,	162.75 "
" Nov. 18, 1875,	"	3, " 3 S., " 4 E.,	80 "
" Dec. 10, 1877,	"	3, " 3 S., " 4 E.,	40 "
" May 10, 1882,	"	9, " 3 S., " 4 E.,	82.20 "
" July 31, 1874,	"	11, " 3 S., " 4 E.,	80 "
" April 1, 1884,	"	13, " 3 S., " 4 E.,	40 "
" Oct. 16, 1884,	"	13, " 3 S., " 4 E.,	40 "
" Nov. 15, 1883,	"	13, " 3 S., " 4 E.,	40 "
" Sept. 30, 1889,	"	13, " 3 S., " 4 E.,	40 "
" June 2, 1886,	"	13, " 3 S., " 4 E.,	40 "
" Feb. 11, 1890,	"	13, " 3 S., " 4 E.,	40 "
" May 17, 1881,	"	13, " 3 S., " 4 E.,	40 "
" Mar. 22, 1882,	"	13, " 3 S., " 4 E.,	40 "
" Mar. 22, 1882,	"	13, " 3 S., " 4 E.,	40 "
" Aug. 13, 1878,	"	13, " 3 S., " 4 E.,	40 "
" Jan. 19, 1878,	"	19, " 3 S., " 4 E.,	204.28 "
" Aug. 28, 1885,	"	19, " 3 S., " 4 E.,	177.13 "
" Dec. 17, 1883,	"	19, " 3 S., " 4 E.,	37.84 "
" June 4, 1883,	"	21, " 3 S., " 4 E.,	80 "
" Feb. 17, 1880,	"	21, " 3 S., " 4 E.,	87.40 "
" Nov. 10, 1882,	"	21, " 3 S., " 4 E.,	47.40 "
" Nov. 11, 1878,	"	21, " 3 S., " 4 E.,	54.51 "
" Nov. 3, 1888,	"	23, " 3 S., " 4 E.,	33.40 "
" Aug. 14, 1884,	"	23, " 3 S., " 4 E.,	33.40 "
" Apr. 12, 1883,	"	23, " 3 S., " 4 E.,	33.40 "
" Feb. 20, 1873,	"	23, " 3 S., " 4 E.,	63.30 "
" June 13, 1891,	"	25, " 3 S., " 4 E.,	80 "
" June 13, 1891,	"	25, " 3 S., " 4 E.,	80 "
" July 9, 1881,	"	25, " 3 S., " 4 E.,	40 "
" July 9, 1891,	"	25, " 3 S., " 4 E.,	40 "
" May 1, 1889,	"	27, " 3 S., " 4 E.,	40 "
" May 1, 1889,	"	27, " 3 S., " 4 E.,	40 "
" July 14, 1883,	"	27, " 3 S., " 4 E.,	120 "
" Sept. 24, 1878,	"	27, " 3 S., " 4 E.,	80 "
" Mar. 9, 1881,	"	27, " 3 S., " 4 E.,	40 "
" Mar. 7, 1889,	"	27, " 3 S., " 4 E.,	80 "
" Mar. 15, 1892,	"	29, " 3 S., " 4 E.,	76.72 "
" Mar. 14, 1879,	"	29, " 3 S., " 4 E.,	40 "
" Oct. 10, 1888,	"	31, " 3 S., " 4 E.,	20 "
" Nov. 27, 1872,	"	31, " 3 S., " 4 E.,	28.60 "
" Feby. 5, 1874,	"	31, " 3 S., " 4 E.,	28.60 "
" May 13, 1887,	"	31, " 3 S., " 4 E.,	61.33 "
" July 5, 1884,	"	31, " 3 S., " 4 E.,	36 "
" July 1, 1890,	"	31, " 3 S., " 4 E.,	44.88 "
" Oct. 16, 1875,	"	33, " 3 S., " 4 E.,	40 "
" June 17, 1889,	"	33, " 3 S., " 4 E.,	40 "
" July 30, 1889,	"	33, " 3 S., " 4 E.,	40 "
" Mar. 18, 1886,	"	33, " 3 S., " 4 E.,	32.50 "
" Oct. 5, 1885,	"	33, " 3 S., " 4 E.,	120 "
" Oct. 3, 1877,	"	35, " 3 S., " 4 E.,	80 "
" Feby. 2, 1889,	"	5, " 3 S., " 5 E.,	40 "

EXHIBIT A. (To answer.)—Continued.

89	Sold Feb'y. 2, 1889,	part	5, Tp. 3 S., R. 5 E.,	40	acres.
	" Feb'y. 4, 1889,	"	5, " 3 S., " 5 E.,	40	"
	" July 12, 1889,	"	5, " 3 S., " 5 E.,	40	"
	" April 15, 1884,	"	5, " 3 S., " 5 E.,	40	"
	" June 18, 1888,	"	5, " 3 S., " 5 E.,	40	"
	" July 1, 1884,	"	5, " 3 S., " 5 E.,	81.19	"
	" Aug. 7, 1884,	"	5, " 3 S., " 5 E.,	121.01	"
	" June 21, 1889,	"	5, " 3 S., " 5 E.,	201.48	"
	" July 6, 1877,	"	7, " 3 S., " 5 E.,	80	"
	" May 3, 1883,	"	7, " 3 S., " 5 E.,	40	"
	" Nov. 1, 1886,	"	7, " 3 S., " 5 E.,	40	"
	" Aug. 2, 1883,	"	7, " 3 S., " 5 E.,	40	"
	" Jan'y. 2, 1891,	"	7, " 3 S., " 5 E.,	39.94	"
	" June 17, 1885,	"	7, " 3 S., " 5 E.,	40.68	"
	" Sept. 25, 1888,	"	9, " 3 S., " 5 E.,	80	"
	" April 1, 1891,	"	9, " 3 S., " 5 E.,	80	"
	" May 13, 1891,	"	9, " 3 S., " 5 E.,	80	"
	" Jan'y. 20, 1890,	"	15, " 3 S., " 5 E.,	40	"
	" Mar. 8, 1890,	"	15, " 3 S., " 5 E.,	80	"
	" Dec. 14, 1889,	"	15, " 3 S., " 5 E.,	40	"
	" Oct. 31, 1879,	"	17, " 3 S., " 5 E.,	40	"
	" April 18, 1883,	"	17, " 3 S., " 5 E.,	40	"
	" April 18, 1883,	"	17, " 3 S., " 5 E.,	40	"
	" June 14, 1882,	"	17, " 3 S., " 5 E.,	80	"
	" Dec. 16, 1872,	"	17, " 3 S., " 5 E.,	120	"
	" Nov. 9, 1878,	"	17, " 3 S., " 5 E.,	40	"
	" Feb'y. 16, 1876,	"	17, " 3 S., " 5 E.,	80	"
	" Feb'y. 16, 1876,	"	17, " 3 S., " 5 E.,	80	"
	" May 8, 1883,	"	19, " 3 S., " 5 E.,	40	"
	" Nov. 23, 1876,	"	19, " 3 S., " 5 E.,	40	"
	" Feb'y. 6, 1877,	"	19, " 3 S., " 5 E.,	77.21	"
	" June 10, 1886,	"	19, " 3 S., " 5 E.,	78	"
	" Dec. 20, 1890,	"	19, " 3 S., " 5 E.,	40	"
	" Nov. 4, 1879,	"	19, " 3 S., " 5 E.,	40	"
	" Nov. 16, 1880,	"	19, " 3 S., " 5 E.,	40	"
	" Feb'y. 16, 1876,	"	19, " 3 S., " 5 E.,	2	"
	" Sept. 22, 1874,	"	19, " 3 S., " 5 E.,	77.31	"
	" Feb'y. 8, 1882,	"	21, " 3 S., " 5 E.,	80	"
	" May 29, 1883,	"	21, " 3 S., " 5 E.,	40	"
	" Oct. 24, 1882,	"	21, " 3 S., " 5 E.,	40	"
	" Nov. 27, 1888,	"	21, " 3 S., " 5 E.,	40	"
	" Dec. 30, 1889,	"	21, " 3 S., " 5 E.,	80	"
	" Mar. 3, 1890,	"	29, " 3 S., " 5 E.,	40	"
	" Nov. 21, 1882,	"	29, " 3 S., " 5 E.,	40	"
	" May 8, 1883,	"	29, " 3 S., " 5 E.,	40	"
	" Aug. 13, 1889,	"	29, " 3 S., " 5 E.,	40	"
	" Dec. 23, 1882,	"	29, " 3 S., " 5 E.,	40	"
	" Dec. 4, 1888,	"	29, " 3 S., " 5 E.,	80	"
	" Oct. 2, 1888,	"	31, " 3 S., " 5 E.,	80	"
	" Dec. 8, 1890,	"	31, " 3 S., " 5 E.,	40	"
	" Oct. 13, 1883,	"	31, " 3 S., " 5 E.,	80	"
	" April 24, 1885,	"	31, " 3 S., " 5 E.,	40	"
	" April 16, 1885,	"	31, " 3 S., " 5 E.,	40	"
	" Nov. 4, 1885,	"	31, " 3 S., " 5 E.,	39.39	"
	" Feb'y. 10, 1890,	"	31, " 3 S., " 5 E.,	40.33	"
	" Nov. 9, 1891,	"	31, " 3 S., " 5 E.,	40	"
	" Aug. 7, 1882,	"	31, " 3 S., " 5 E.,	40	"
	" June 27, 1891,	"	31, " 3 S., " 5 E.,	40	"
	" Dec. 8, 1890,	"	33, " 3 S., " 5 E.,	80	"
	" Nov. 9, 1878,	"	1, " 4 S., " 1 E.,	40	"
	" Dec. 6, 1876,	"	1, " 4 S., " 1 E.,	40	"
	" Dec. 24, 1889,	"	1, " 4 S., " 1 E.,	40	"
	" Dec. 24, 1889,	"	1, " 4 S., " 1 E.,	40	"
	" Oct. 17, 1887,	"	11, " 4 S., " 1 E.,	40	"
	" Nov. 23, 1889,	"	13, " 4 S., " 1 E.,	40	"
	" Nov. 23, 1889,	"	13, " 4 S., " 1 E.,	40	"
	" June 23, 1882,	"	23, " 4 S., " 1 E.,	40	"
	" Oct. 29, 1890,	"	23, " 4 S., " 1 E.,	40	"

EXHIBIT A. (To answer.)—Continued.

Sold Aug. 24, 1882,	part	27, Tp. 4 S., R. 1 E.,	15.36 acres.
" Jan. 25, 1877,	"	1, " 4 S., " 2 E.,	80.10 "
" May 21, 1883,	"	1, " 4 S., " 2 E.,	40.14 "
" April 28, 1883,	"	1, " 4 S., " 2 E.,	40 "
" April 12, 1884,	"	1, " 4 S., " 2 E.,	40 "
" April 15, 1884,	"	1, " 4 S., " 2 E.,	40 "
" Feby. 15, 1884,	"	1, " 4 S., " 2 E.,	80 "
" April 13, 1884,	"	1, " 4 S., " 2 E.,	40 "
" July 16, 1888,	"	1, " 4 S., " 2 E.,	40 "
" May 3, 1879,	"	1, " 4 S., " 2 E.,	40 "
" Jan. 25, 1888,	"	1, " 4 S., " 2 E.,	40 "
" Nov. 9, 1891,	"	3, " 4 S., " 2 E.,	120 "
" June 29, 1885,	"	5, " 4 S., " 2 E.,	39.67 "
" July 16, 1885,	"	5, " 4 S., " 2 E.,	40 "
" April 29, 1889,	"	5, " 4 S., " 2 E.,	40 "
" Jan. 10, 1889,	"	5, " 4 S., " 2 E.,	40 "
" Nov. 25, 1889,	"	7, " 4 S., " 2 E.,	160 "
" Jan. 3, 1891,	"	11, " 4 S., " 2 E.,	40 "
" Aug. 7, 1890,	"	11, " 4 S., " 2 E.,	40 "
" Aug. 17, 1889,	"	11, " 4 S., " 2 E.,	40 "
" May 28, 1890,	"	11, " 4 S., " 2 E.,	160 "
" June 8, 1889,	"	11, " 4 S., " 2 E.,	40 "
" June 4, 1883,	"	11, " 4 S., " 2 E.,	40 "
" Mar. 27, 1888,	"	11, " 4 S., " 2 E.,	40 "
" April 29, 1889,	"	11, " 4 S., " 2 E.,	40 "
" April 25, 1884,	"	11, " 4 S., " 2 E.,	40 "
" Oct. 11, 1882,	"	11, " 4 S., " 2 E.,	40 "
" May 2, 1889,	"	11, " 4 S., " 2 E.,	80 "
" April 25, 1883,	"	13, " 4 S., " 2 E.,	80 "
" Sept. 15, 1883,	"	13, " 4 S., " 2 E.,	80 "
" May 1, 1882,	"	13, " 4 S., " 2 E.,	80 "
" Nov. 13, 1890,	"	13, " 4 S., " 2 E.,	40 "
" Oct. 24, 1877,	"	13, " 4 S., " 2 E.,	40 "
" Oct. 18, 1887,	"	15, " 4 S., " 2 E.,	40 "
" April 17, 1890,	"	15, " 4 S., " 2 E.,	40 "
" July 6, 1889,	"	15, " 4 S., " 2 E.,	40 "
" Dec. 9, 1889,	"	15, " 4 S., " 2 E.,	40 "
" May 14, 1889,	"	15, " 4 S., " 2 E.,	80 "
" Jan. 17, 1882,	"	15, " 4 S., " 2 E.,	40 "
" June 26, 1883,	"	15, " 4 S., " 2 E.,	40 "
" Feby. 6, 1888,	"	15, " 4 S., " 2 E.,	40 "
" Jan. 11, 1875,	"	19, " 4 S., " 2 E.,	37.56 "
" Oct. 27, 1879,	"	19, " 4 S., " 2 E.,	18 "
" Dec. 12, 1879,	"	21, " 4 S., " 2 E.,	160 "
" Dec. 9, 1882,	"	21, " 4 S., " 2 E.,	40 "
" May 23, 1888,	"	23, " 4 S., " 2 E.,	160 "
" June 27, 1888,	"	23, " 4 S., " 2 E.,	120 "
" May 19, 1890,	"	23, " 4 S., " 2 E.,	40 "
" Sept. 19, 1888,	"	23, " 4 S., " 2 E.,	80 "
" April 18, 1883,	"	23, " 4 S., " 2 E.,	80 "
" April 27, 1883,	"	23, " 4 S., " 2 E.,	80 "
" Sept. 22, 1888,	"	25, " 4 S., " 2 E.,	120 "
" Sept. 22, 1888,	"	25, " 4 S., " 2 E.,	120 "
" Sept. 22, 1888,	"	25, " 4 S., " 2 E.,	160 "
" Sept. 19, 1882,	"	35, " 4 S., " 2 E.,	13.63 "
" July 31, 1871,	"	1, " 4 S., " 3 E.,	80.17 "
" Nov. 27, 1872,	"	3, " 4 S., " 3 E.,	40.20 "
" Dec. 16, 1872,	"	3, " 4 S., " 3 E.,	40 "
" June 24, 1891,	"	3, " 4 S., " 3 E.,	40 "
" April 9, 1890,	"	3, " 4 S., " 3 E.,	40 "
" Dec. 16, 1879,	"	5, " 4 S., " 3 E.,	80 "
" Nov. 4, 1876,	"	5, " 4 S., " 3 E.,	80 "
" Feby. 10, 1880,	"	7, " 4 S., " 3 E.,	80 "
" Mar. 11, 1889,	"	7, " 4 S., " 3 E.,	207.211 "
" April 21, 1888,	"	7, " 4 S., " 3 E.,	46.98 "
" Dec. 16, 1872,	"	7, " 4 S., " 3 E.,	8.18 "
" Aug. 17, 1876,	"	9, " 4 S., " 3 E.,	80 "
" Feby. 19, 1875,	"	9, " 4 S., " 3 E.,	40 "

EXHIBIT A. (To answer.)—Continued.

Sold	Feb'y. 18, 1889,	part	11, Tp. 4 S., R 3 E.,	43.37 acres.
"	Oct. 21, 1889,	"	11, " 4 S., " 3 E.,	24.97 "
"	Aug. 1875,	"	13, " 4 S., " 3 E.,	40 "
"	July 10, 1879,	"	13, " 4 S., " 3 E.,	40 "
"	Sept. 26, 1883,	"	13, " 4 S., " 3 E.,	80 "
"	Mar. 22, 1886,	"	13, " 4 S., " 3 E.,	80 "
"	Dec. 11, 1885,	"	13, " 4 S., " 3 E.,	160 "
"	Dec. 5, 1888,	"	13, " 4 S., " 3 E.,	40 "
"	Jany. 29, 1889,	"	17, " 4 S., " 3 E.,	80 "
"	May 1, 1890,	"	19, " 4 S., " 3 E.,	47.33 "
"	Nov. 26, 1889,	"	21, " 4 S., " 3 E.,	120 "
"	Dec. 14, 1888,	"	21, " 4 S., " 3 E.,	160 "
"	Dec. 14, 1888,	"	21, " 4 S., " 3 E.,	80 "
"	Mar. 5, 1890,	"	21, " 4 S., " 3 E.,	80 "
"	Dec. 15, 1882,	"	21, " 4 S., " 3 E.,	40 "
"	Oct. 1, 1885,	"	23, " 4 S., " 3 E.,	160 "
"	July 1, 1890,	"	23, " 4 S., " 3 E.,	40 "
"	Aug. 16, 1886,	"	23, " 4 S., " 3 E.,	40 "
"	Oct. 27, 1885,	"	23, " 4 S., " 3 E.,	120 "
"	Mar. 27, 1877,	"	23, " 4 S., " 3 E.,	40 "
"	May 25, 1878,	"	23, " 4 S., " 3 E.,	40 "
"	April 23, 1889,	"	23, " 4 S., " 3 E.,	40 "
"	April 23, 1889,	"	23, " 4 S., " 3 E.,	40 "
"	Dec. 19, 1888,	"	25, " 4 S., " 3 E.,	40 "
"	Dec. 19, 1889,	"	25, " 4 S., " 3 E.,	40 "
"	May 31, 1889,	"	25, " 4 S., " 3 E.,	40 "
"	June 30, 1883,	"	25, " 4 S., " 3 E.,	40 "
"	April 14, 1891,	"	25, " 4 S., " 3 E.,	40 "
"	July 30, 1877,	"	25, " 4 S., " 3 E.,	40 "
"	June 2, 1890,	"	25, " 4 S., " 3 E.,	160 "
"	Aug. 27, 1889,	"	27, " 4 S., " 3 E.,	40 "
"	June 19, 1890,	"	27, " 4 S., " 3 E.,	40 "
"	Sept. 25, 1885,	"	27, " 4 S., " 3 E.,	120 "
"	Aug. 13, 1889,	"	27, " 4 S., " 3 E.,	40 "
"	Aug. 13, 1889,	"	27, " 4 S., " 3 E.,	40 "
"	Aug. 21, 1889,	"	27, " 4 S., " 3 E.,	80 "
"	Dec. 4, 1875,	"	27, " 4 S., " 3 E.,	40 "
"	May 1, 1884,	"	29, " 4 S., " 3 E.,	160 "
"	Dec. 2, 1890,	"	31, " 4 S., " 3 E.,	80 "
"	Aug. 6, 1890,	"	31, " 4 S., " 3 E.,	80 "
"	June 12, 1890,	"	33, " 4 S., " 3 E.,	80 "
"	Oct. 14, 1890,	"	33, " 4 S., " 3 E.,	80 "
"	July 7, 1888,	"	33, " 4 S., " 3 E.,	80 "
"	July 29, 1890,	"	33, " 4 S., " 3 E.,	40 "
"	Jany. 19, 1878,	"	35, " 4 S., " 3 E.,	80 "
"	Dec. 28, 1877,	"	35, " 4 S., " 3 E.,	400 "
"	Sept. 3, 1890,	"	1, " 4 S., " 4 E.,	40.03 "
"	Nov. 8, 1872,	"	1, " 4 S., " 4 E.,	80.08 "
"	April 12, 1878,	"	1, " 4 S., " 4 E.,	40 "
"	April 10, 1891,	"	1, " 4 S., " 4 E.,	80 "
"	April 10, 1891,	"	1, " 4 S., " 4 E.,	80 "
"	July 23, 1883,	"	1, " 4 S., " 4 E.,	80 "
"	April 26, 1889,	"	3, " 4 S., " 4 E.,	42.26 "
"	Dec. 3, 1875,	"	3, " 4 S., " 4 E.,	82 "
"	Dec. 12, 1878,	"	3, " 4 S., " 4 E.,	38.17 "
"	June 3, 1882,	"	3, " 4 S., " 4 E.,	37.74 "
"	Aug. 30, 1877,	"	7, " 4 S., " 4 E.,	38.21 "
"	Dec. 27, 1882,	"	7, " 4 S., " 4 E.,	76.16 "
"	Nov. 3, 1882,	"	9, " 4 S., " 4 E.,	29.59 "
"	May 7, 1875,	"	9, " 4 S., " 4 E.,	39.67 "
"	Aug. 25, 1890,	"	9, " 4 S., " 4 E.,	59.02 "
"	Sept. 13, 1890,	"	11, " 4 S., " 4 E.,	40 "
"	April 6, 1891,	"	11, " 4 S., " 4 E.,	80 "
"	April 6, 1891,	"	11, " 4 S., " 4 E.,	80 "
"	Dec. 22, 1890,	"	11, " 4 S., " 4 E.,	80 "
"	Sept. 1875,	"	11, " 4 S., " 4 E.,	19.97 "
"	Dec. 18, 1890,	"	11, " 4 S., " 4 E.,	69.90 "
"	Oct. 6, 1890,	"	11, " 4 S., " 4 E.,	40 "

EXHIBIT A. (To answer.)—Continued.

Sold	July 16, 1890,	part	11. Tp. 4 S., R. 4 E.,	40	acres.
"	April 15, 1891,	"	13, " 4 S., " 4 E.,	80	"
"	Aug. 21, 1891,	"	13, " 4 S., " 4 E.,	80	"
"	Aug. 21, 1891,	"	13, " 4 S., " 4 E.,	160	"
"	July 19, 1886,	"	15, " 4 S., " 4 E.,	80	"
"	Oct. 29, 1890,	"	15, " 4 S., " 4 E.,	80	"
"	Oct. 28, 1874,	"	15, " 4 S., " 4 E.,	80	"
"	Nov. 20, 1890,	"	15, " 4 S., " 4 E.,	80	"
"	Aug. 6, 1890,	"	15, " 4 S., " 4 E.,	72.50	"
"	Aug. 6, 1890,	"	15, " 4 S., " 4 E.,	18	"
"	April 8, 1885,	"	15, " 4 S., " 4 E.,	44.76	"
"	Feby. 1, 1881,	"	15, " 4 S., " 4 E.,	2	"
"	Feby. 27, 1890,	"	17, " 4 S., " 4 E.,	131.13	"
"	Oct. 23, 1889,	"	17, " 4 S., " 4 E.,	40	"
"	July 8, 1884,	"	17, " 4 S., " 4 E.,	40	"
"	May 14, 1885,	"	19, " 4 S., " 4 E.,	118.70	"
"	Dec. 16, 1872,	"	19, " 4 S., " 4 E.,	40	"
"	Nov. 27, 1872,	"	19, " 4 S., " 4 E.,	160	"
"	April 24, 1886,	"	19, " 4 S., " 4 E.,	78.90	"
"	Nov. 18, 1873,	"	19, " 4 S., " 4 E.,	79.10	"
"	Sept. 29, 1886,	"	21, " 4 S., " 4 E.,	80	"
"	Jany. 13, 1890,	"	21, " 4 S., " 4 E.,	80	"
"	April 17, 1885,	"	21, " 4 S., " 4 E.,	80	"
"	June 2, 1874,	"	21, " 4 S., " 4 E.,	80	"
"	Feby. 16, 1883,	"	21, " 4 S., " 4 E.,	80	"
"	Dec. 22, 1890,	"	23, " 4 S., " 4 E.,	80	"
"	Feby. 14, 1890,	"	23, " 4 S., " 4 E.,	40	"
"	Sept. 22, 1890,	"	23, " 4 S., " 4 E.,	40	"
"	Oct. 15, 1891,	"	23, " 4 S., " 4 E.,	40	"
"	Jany. 7, 1885,	"	23, " 4 S., " 4 E.,	40	"
"	Aug. 23, 1890,	"	23, " 4 S., " 4 E.,	40	"
"	June 2, 1885,	"	23, " 4 S., " 4 E.,	40	"
"	Oct. 18, 1890,	"	23, " 4 S., " 4 E.,	40	"
"	Dec. 26, 1891,	"	23, " 4 S., " 4 E.,	80	"
"	June 11, 1890,	"	29, " 4 S., " 4 E.,	40	"
"	Jany. 24, 1890,	"	29, " 4 S., " 4 E.,	40	"
"	June 11, 1890,	"	29, " 4 S., " 4 E.,	80	"
"	April 19, 1883,	"	29, " 4 S., " 4 E.,	40	"
"	April 29, 1889,	"	29, " 4 S., " 4 E.,	40	"
"	April 29, 1889,	"	29, " 4 S., " 4 E.,	40	"
"	Nov. 27, 1872,	"	29, " 4 S., " 4 E.,	80	"
"	Dec. 22, 1871,	"	29, " 4 S., " 4 E.,	80	"
"	Jany. 3, 1891,	"	31, " 4 S., " 4 E.,	40	"
"	Oct. 10, 1890,	"	31, " 4 S., " 4 E.,	40	"
"	Jany. 8, 1889,	"	31, " 4 S., " 4 E.,	80	"
"	Jany. 29, 1883,	"	31, " 4 S., " 4 E.,	121.48	"
"	Oct. 27, 1890,	"	31, " 4 S., " 4 E.,	40	"
"	May 2, 1882,	"	31, " 4 S., " 4 E.,	81.91	"
"	Oct. 10, 1891,	"	33, " 4 S., " 4 E.,	40	"
"	July 30, 1891,	"	3, " 1 S., " 5 E.,	158.62	"
"	April 4, 1891,	"	3, " 4 S., " 5 E.,	80	"
"	Feby. 2, 1891,	"	5, " 4 S., " 5 E.,	80.84	"
"	April 11, 1891,	"	5, " 4 S., " 5 E.,	80.99	"
"	Jany. 24, 1891,	"	5, " 4 S., " 5 E.,	81.13	"
"	Oct. 9, 1891,	"	5, " 4 S., " 5 E.,	40	"
"	Oct. 9, 1891,	"	5, " 4 S., " 5 E.,	40	"
"	Mar. 22, 1892,	"	11, " 4 S., " 5 E.,	80	"
"	Aug. 8, 1881,	"	1, " 5 S., " 1 E.,	161.12	"
"	Feby. 16, 1876,	"	13, " 5 S., " 1 E.,	160	"
"	June 21, 1882,	"	1, " 5 S., " 2 E.,	86.77	"
"	Jany. 16, 1890,	"	3, " 5 S., " 2 E.,	103.21	"
"	Feby. 10, 1876,	"	7, " 5 S., " 2 E.,	57.39	"
"	Sept. 6, 1886,	"	13, " 5 S., " 2 E.,	40	"
"	Dec. 9, 1899,	"	13, " 5 S., " 2 E.,	71.85	"
"	Aug. 18, 1886,	"	13, " 5 S., " 2 E.,	98.20	"
"	Oct. 8, 1875,	"	19, " 5 S., " 2 E.,	78.36	"
"	Oct. 4, 1889,	"	25, " 5 S., " 2 E.,	118.60	"
"	Dec. 9, 1891,	"	35, " 5 S., " 2 E.,	80	"
"	July 10, 1880,	"	1, " 5 S., " 3 E.,	40	"

EXHIBIT A. (To answer.)—Continued.

	Sold Dec. 3, 1886,	part	1, Tp. 5 S., R. 3 E.,	80	acres.
	" Sept. 22, 1887,	"	1, " 5 S., " 3 E.,	40	"
	" Oct. 18, 1887,	"	1, " 5 S., " 3 E.,	40	"
	" Sept. 21, 1891,	"	1, " 5 S., " 3 E.,	40	"
	" Sept. 21, 1891,	"	1, " 5 S., " 3 E.,	40	"
	" Sept. 25, 1891,	"	1, " 5 S., " 3 E.,	40	"
	" Nov. 14, 1876,	"	3, " 5 S., " 3 E.,	352, 16	"
	" Dec. 28, 1877,	"	3, " 5 S., " 3 E.,	157, 10	"
	" Dec. 8, 1879,	"	3, " 5 S., " 3 E.,	120	"
	" Aug. 27, 1877,	"	5, " 5 S., " 3 E.,	79, 23	"
	" Jan. 19, 1878,	"	5, " 5 S., " 3 E.,	80, 12	"
	" Dec. 15, 1884,	"	5, " 5 S., " 3 E.,	40	"
	" Mar. 3, 1886,	"	5, " 5 S., " 3 E.,	40	"
	" April 16, 1886,	"	7, " 5 S., " 3 E.,	40	"
	" Oct. 10, 1876,	"	9, " 5 S., " 3 E.,	40	"
	" May 2, 1877,	"	9, " 5 S., " 3 E.,	280	"
	" Dec. 26, 1878,	"	9, " 5 S., " 3 E.,	320	"
	" July 1, 1889,	"	11, " 5 S., " 3 E.,	40	"
	" Feby. 10, 1890,	"	11, " 5 S., " 3 E.,	80	"
	" Jan. 19, 1878,	"	11, " 5 S., " 3 E.,	80	"
96	Sale May 15, 1888,	"	13, " 5 S., " 3 E.,	40	"
	" April 3, 1888,	"	13, " 5 S., " 3 E.,	46	"
	" July 8, 1899,	"	13, " 5 S., " 3 E.,	10	"
	" Oct. 18, 1876,	"	15, " 5 S., " 3 E.,	400	"
	" May 2, 1877,	"	15, " 5 S., " 3 E.,	240	"
	" Dec. 1, 1883,	"	17, " 5 S., " 3 E.,	160	"
	" Dec. 1, 1883,	"	17, " 5 S., " 3 E.,	280	"
	" Dec. 1, 1883,	"	17, " 5 S., " 3 E.,	40	"
	" June 22, 1887,	"	17, " 5 S., " 3 E.,	40	"
	" Sept. 15, 1879,	"	17, " 5 S., " 3 E.,	10	"
	" Aug. 10, 1882,	"	19, " 5 S., " 3 E.,	40, 27	"
	" Nov. 1, 1882,	"	19, " 5 S., " 3 D.,	112, 60	"
	" June 7, 1886,	"	19, " 5 S., " 3 E.,	104, 08	"
	" Dec. 26, 1878,	"	21, " 5 S., " 3 E.,	320	"
	" Nov. 24, 1886,	"	21, " 5 S., " 3 E.,	40	"
	" Feby. 4, 1889,	"	21, " 5 S., " 3 E.,	80	"
	" Jan. 17, 1891,	"	23, " 5 S., " 3 E.,	10	"
	" Sept. 28, 1891,	"	23, " 5 S., " 3 E.,	10	"
	" Mar. 11, 1892,	"	23, " 5 S., " 3 E.,	80	"
	" May 11, 1885,	"	29, " 5 S., " 3 E.,	40	"
	" Nov. 22, 1886,	"	29, " 5 S., " 3 E.,	80	"
	" Nov. 22, 1886,	"	29, " 5 S., " 3 E.,	120	"
	" June 20, 1887,	"	29, " 5 S., " 3 E.,	40	"
	" June 21, 1887,	"	29, " 5 S., " 3 E.,	40	"
	" July 30, 1889,	"	29, " 5 S., " 3 E.,	40	"
	" Nov. 22, 1888,	"	29, " 5 S., " 3 E.,	80	"
	" Feby. 12, 1889,	"	29, " 5 S., " 3 E.,	40	"
	" June 9, 1886,	"	31, " 5 S., " 3 E.,	80	"
	" Oct. 28, 1887,	"	31, " 5 S., " 3 E.,	53, 32	"
	Sold Oct. 28, 1891,	"	31, " 5 S., " 3 E.,	40	"
	" Oct. 28, 1891,	"	31, " 5 S., " 3 E.,	10	"
	" Oct. 17, 1882,	"	1, " 6 S., " 1 E.,	79, 52	"
	" Nov. 23, 1889,	"	1, " 6 S., " 1 E.,	40	"
	" Feby. 9, 1880,	"	11, " 6 S., " 1 E.,	61, 91	"
	" Aug. 17, 1877,	"	13, " 6 S., " 1 E.,	10	"
	" Feby. 3, 1892,	"	13, " 6 S., " 1 E.,	40	"
	" April 23, 1871,	"	23, " 6 S., " 1 E.,	39, 10	"
	" July 2, 1875,	"	23, " 6 S., " 1 E.,	40	"
	" April 25, 1876,	"	23, " 6 S., " 1 E.,	39, 40	"
	" April 29, 1880,	"	23, " 6 S., " 1 E.,	40	"
	" Sept. 21, 1881,	"	1, " 6 S., " 2 E.,	80	"
	" May 3, 1885,	"	1, " 6 S., " 2 E.,	40	"
	" Jan. 9, 1878,	"	3, " 6 S., " 2 E.,	80	"
	" Dec. 22, 1880,	"	3, " 6 S., " 2 E.,	161, 76	"
	" June 2, 1882,	"	3, " 6 S., " 2 E.,	80	"
	" Sept. 20, 1882,	"	3, " 6 S., " 2 E.,	40	"
	" Dec. 12, 1882,	"	3, " 6 S., " 2 E.,	40	"
	" April 26, 1875,	"	5, " 6 S., " 2 E.,	80	"
	" Jan. 24, 1883,	"	5, " 6 S., " 2 E.,	80	"

EXHIBIT A. (To answer.)—Continued.

Sold Nov. 10, 1891,	part	5, Tp. 6 S., R. 2 E.,	41. 15 acres.
" July 1, 1882,	"	9, " 6 S., " 2 E.,	40 "
" April 28, 1882,	"	9, " 6 S., " 2 E.,	80 "
" May 11, 1877,	"	11, " 6 S., " 2 E.,	80 "
" Nov. 12, 1878,	"	11, " 6 S., " 2 E.,	120 "
" June 17, 1885,	"	11, " 6 S., " 2 E.,	40 "
" July 9, 1875,	"	13, " 6 S., " 2 E.,	120 "
" Nov. 3, 1875,	"	13, " 6 S., " 2 E.,	80 "
" June 11, 1878,	"	13, " 6 S., " 2 E.,	80 "
" Nov. 4, 1878,	"	15, " 6 S., " 2 E.,	80 "
" Oct. 16, 1882,	"	15, " 6 S., " 2 E.,	120 "
" July 1, 1882,	"	17, " 6 S., " 2 E.,	40 "
" Nov. 21, 1874,	"	17, " 6 S., " 2 E.,	120 "
" May 31, 1888,	"	17, " 6 S., " 2 E.,	80 "
" Dec. 17, 1889,	"	17, " 6 S., " 2 E.,	40 "
" Dec. 17, 1889,	"	17, " 6 S., " 2 E.,	40 "
" Jan. 31, 1890,	"	17, " 6 S., " 2 E.,	40 "
" April 5, 1876,	"	19, " 6 S., " 2 E.,	74. 72 "
" Mar. 8, 1883,	"	19, " 6 S., " 2 E.,	40 "
" Aug. 23, 1883,	"	19, " 6 S., " 2 E.,	40 "
" Dec. 19, 1890,	"	19, " 6 S., " 2 E.,	80 "
" Oct. 28, 1874,	"	21, " 6 S., " 2 E.,	160 "
" May 18, 1883,	"	21, " 6 S., " 2 E.,	320 "
" May 15, 1883,	"	21, " 6 S., " 2 E.,	80 "
" May 24, 1879,	"	23, " 6 S., " 2 E.,	80 "
" July 31, 1877,	"	23, " 6 S., " 2 E.,	160 "
" May 16, 1883,	"	23, " 6 S., " 2 E.,	80 "
" May 18, 1883,	"	23, " 6 S., " 2 E.,	240 "
" Jan. 10, 1876,	"	25, " 6 S., " 2 E.,	120 "
" Oct. 9, 1884,	"	25, " 6 S., " 2 E.,	40 "
" May 1, 1889,	"	25, " 6 S., " 2 E.,	80 "
" May 31, 1882,	"	27, " 6 S., " 2 E.,	40 "
" May 7, 1883,	"	27, " 6 S., " 2 E.,	120 "
" May 7, 1883,	"	27, " 6 S., " 2 E.,	320 "

Total acres sold, 61,336.23 A.

98 STATE OF OREGON, *County of Multnomah, ss:*

Due service of the within answer is hereby accepted, in said county, Oregon, this 25th day of June, 1894, by receiving a copy thereof, duly certified to as such by W. D. Fenton, of solicitors for defendants.

DANIEL R. MURPHY,

U. S. District Attorney, and Solicitor for Complainant.

(Endorsed :) Filed June 25, 1894. J. A. Shaden, clerk.

And afterwards, to wit, on Monday, the 2d day of July, 1894, the same being the 73d judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon,
July 2, 1894.

THE UNITED STATES

*vs.*THE OREGON AND CALIFORNIA RAILROAD
Company et al.

No. 1982.

Order extending time to file replication.

Now, at this day, on motion of Mr. John M. Gearin, of counsel
99 for the plaintiff, it is ordered that the plaintiff herein be, and it

is hereby, allowed ten days from this date in which to plead to the answer herein.

And afterwards, to wit, on Friday, the 13th day of July, 1894, the same being the 83d judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon,
July 13, 1894.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
OREGON & CALIFORNIA RAILROAD Company et al.		

Order extending time to file replication.

Now, at this day, on motion of Mr. Daniel R. Murphy, United States attorney, it is ordered that the time for filing the replication herein be, and the same is hereby, extended five days from this date.

And afterwards, to wit, on the 14th day of July, 1894, there was duly filed in said court a replication, in words and figures as follows, to wit:

100 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES OF AMERICA, COMPLAINANT,	}	In equity.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD COMPANY, John A. Hurlburt, and Thos. L. Evans, defendants.		

Replication to answer.

This repliant, the United States of America, saving and reserving to itself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants for a replication thereunto, saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this repliant is ready to

101 aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

DANIEL R. MURPHY,

U. S. Attorney and Solicitor for Complainant.

Due service of the within reply by certified copy, as provided by law, is hereby admitted at Portland, Or., July, 1894.

(Endorsed:) Filed July 14, 1894. J. A. Sladen, clerk.

And afterwards, to wit, on the 26th day of July, 1894, there was duly filed in said court a notice, in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, COMPLAINANT,

vs.

THE OREGON & CALIFORNIA RAILROAD COMPANY,
John A. Hurlburt, and Thomas L. Evans, defendants.

Notice to take evidence orally.

To the above-named complainant, and to Daniel R. Murphy, U. S. district attorney, and to John M. Geurin, solicitor for complainant:

102 You and each of you will take notice that the defendants above named desire the evidence to be adduced in the above-entitled cause to be taken orally.

Dated July 24th, 1894.

E. C. BRONAUGH,
L. L. McARTHUR,
W. D. FENTON,
E. C. BRONAUGH, Jr.,
Solicitors for Defendants.

STATE OF OREGON,

County of Multnomah, ss:

Due service of the within notice is hereby accepted in said county, Oregon, this 24th day of July, 1894, by receiving a copy thereof, duly certified to as such by W. D. Fenton, of solicitors for defendants.

D. R. MURPHY,
Solicitor for Complainant.

(Endorsed:) Filed July 26, 1894. J. A. Sladen, clerk.

And afterwards, to wit, on Friday, the 27th day of July, 1894, the same being the 95th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

103 In the circuit court of the United States for the district of Oregon. July 27, 1894.

THE UNITED STATES

vs.

THE OREGON AND CALIFORNIA RAILROAD
Company et al.

No. 1982.

Order fixing time for the taking of testimony.

Now, at this day, upon motion of Mr. W. D. Fenton, of counsel for the defendants, the plaintiff being present by its counsel, Mr. Daniel R. Murphy, United States attorney, and agreeing thereto, it is ordered that

the plaintiff be, and it is hereby, allowed 30 days from this date in which to take its evidence herein; that after notice from the plaintiff that its evidence in chief is taken, the defendants be, and they are hereby, allowed 60 days in which to take their testimony herein, and that, after notice shall have been given to said plaintiff that the said evidence is taken by said defendants, the plaintiff be, and it is hereby, allowed 30 days further time in which to take its testimony in rebuttal; and it is further ordered that said evidence be taken orally, and that either party is authorized to apply to the court for further time or for modification of this order upon sufficient cause being shown therefor.

And afterwards, to wit, on Monday, the 24th day of September, 1894, the same being the 145th judicial day of the regular

April term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.
September 24, 1893.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD Company et al.		

Order appointing special examiner.

Now, at this day, comes the plaintiff, by Mr. John M. Gearin, special counsel, and the defendants by Mr. W. D. Fenton, of counsel, and thereupon said defendants move the court for an order appointing some qualified person at the city of Portland, Oregon, to act as special examiner of this court, to take orally such depositions and testimony as the parties hereto desire to be taken at said city of Portland. It is therefore ordered that Mr. F. S. Lafferty, of Portland, Oregon, be, and he is hereby, appointed a special examiner of this court, with power and authority to take and transmit to this court such depositions and testimony in this cause as the parties hereto desire to be taken at said city of Portland, and at such time as may suit the convenience of said examiner and of the parties hereto; and that said examiner extend said testimony

105 when so taken and report the same to this court with all convenient speed. Said testimony, when so taken, to be used upon the trial of this cause.

(Signed)

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed September 24, 1894. J. A. Sladen, clerk.

And afterwards, to wit, on Thursday, the 27th day of September, 1894, the same being the 148th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United

States district judge, presiding—the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.
September 27, 1894.

THE UNITED STATES	}	No. 1982.
<i>vs.</i>		
THE OREGON AND CALIFORNIA RAILROAD Company et al.		

Order extending plaintiff's time to take testimony.

Now, at this day, on motion of Mr. Daniel R. Murphy, United States attorney, it is ordered that the time heretofore allowed for the taking of testimony in this cause by the plaintiff be, and the same is hereby, extended until thirty days from this date.

And afterwards, to wit, on Monday, the 9th of September, 1895, the same being the 132d judicial day of the regular April term of said court—present, the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES OF AMERICA, COMPLAINANT,	}
<i>vs.</i>	
THE OREGON & CALIFORNIA RAILROAD COMPANY, John A. Hurlburt, and Thomas L. Evans, defendant.	

Final decree.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

I.

That the several patents described in the bill herein issued by the United States to defendant. The Oregon and California Railroad Company, on May 9th, 1871, July 12th, 1871, June 22nd, 1871, and June 18, 1877, in so far as they purport to convey title to the lands described in the bill herein, to wit:

Lot number five (5), section thirty-five (35), township one (1) south, range one (1) east; lot number two (2), section three (3), township two (2) south, range one (1) east; lots number one (1) and eight (8), section nine (9), township two (2) south, range one (1) east; lots number one (1), seven (7), eight (8), and nine (9), section fifteen (15), township three (3) south, range one (1) east; lot number one (1), section twenty-five (25), township three (3) south,

range one (1) east; lots one (1), two (2), three (3), and four (4), section thirty-five (35), township three (3) south, range one (1) east; southeast quarter section one (1), township four (4) south, range one (1) east; northeast quarter southwest quarter section eleven (11), township four south, range one (1) east; west half northeast quarter section thirteen (13), township four (4) south, range one (1) east; north half southeast quarter section twenty-three (23), township four (4) south, range one (1) east; lot number one (1), section twenty-seven (27), township four (4) south, range one (1) east; northwest quarter section one (1), township five (5) south, range one (1) east; west half southeast quarter section nine (9), township five (5) south, range one (1) east; east half northwest quarter and east half southwest quarter section thirteen (13), township five (5) south, range one (1) east; northeast quarter section one (1), township six (6) south, range one (1) east; lots number eight (8) and nine (9), section eleven (11), township six (6) south, range one (1) east; west half section thirteen (13), township six (6) south, range one (1) east; west half northeast quarter and west half southeast quarter section thirteen (13), township six (6) south, range one (1) east; east half northeast quarter and lots number one (1) and two (2), section twenty-three (23), township six (6) south, range one (1) east; southeast quarter southeast quarter section nine (9), township one (1) south, range two (2) east; lot number two (2), section eleven (11), township one (1)

108 south, range two (2) east; northeast quarter northeast quarter section fifteen (15), township one (1) south, range two (2) east; south half and lots number one (1), two (2), three (3), and four (4), section twenty-three (23), township one (1) south, range two (2) east; southeast quarter southeast quarter and west half southwest quarter section twenty-seven (27), township one (1) south, range two (2) east; southeast quarter northeast quarter and lots one (1), two (2), and four (4), section twenty-nine (29), township one (1) south, range two (2) east; lots number three (3) and four (4), section thirty-five (35), township one (1) south, range two (2) east; north half of southeast quarter of southwest quarter section one (1), township two (2) south, range two (2) east; southwest quarter northeast quarter and south half northwest quarter section three (3), township two (2) south, range two (2) east; lots four (4) and seven (7), section thirteen (13), township two (2) south, range two (2) east; southwest quarter, northwest quarter, and southwest quarter section twenty-three (23), township two (2) south, range two (2) east; west half northeast quarter, northwest quarter, north half southwest quarter, and northwest quarter southeast quarter section thirty-five (35), township two (2) south, range two (2) east; east half southeast quarter, west half northwest quarter, and west half southwest quarter section one (1), township three (3) south, range two (2) east; lots one (1) and two (2), section three (3), township three (3) south, range two (2) east; southeast quarter northwest quarter, east half southwest quarter, southwest quarter of southwest

109 quarter, east half, and lots one (1), two (2), and three (3) section eleven (11), township three (3) south, range two (2) east; east half section thirteen (13), township three (3) south, range two (2) east; northwest quarter section thirteen (13), township three (3) south, range two (2) east; south half southeast quarter and lots one (1), two (2), three (3), four (4), and (5), section seventeen (17), township three (3)

south, range two (2) east; lot five (5), section fifteen (15), township three (3) south, range two (2) east; southeast quarter southeast quarter and west half southeast quarter section twenty-five (25), township three (3) south, range two (2) east; north half northeast quarter and northwest quarter section twenty-nine (29), township three (3) south, range two (2) east; north half northeast quarter and north half northwest quarter section thirty-one (31), township three (3) south, range two (2) east; southeast quarter northeast quarter, southwest quarter southeast quarter, west half southwest quarter, southeast quarter southwest quarter, southwest quarter northwest quarter section thirty-one (31), township three (3) south, range two (2) east; northwest quarter and south half section one (1), township four (4) south, range two (2) east; southeast quarter, northwest quarter, and east half southwest quarter section three (3), township four (4) south, range two (2) east; west half northwest quarter and west half southwest quarter section five (5), township four (4) south, range two east; northeast quarter section seven (7), township four (4) south, range two (2) east; all section eleven (11), township four (4) south, range two (2) east; north half southeast quarter, west half northeast quarter, and northwest quarter section thirteen (13), township four

(4) south, range two (2) east; east half northwest quarter, southwest quarter, and east half section fifteen (15), township four (4)

south, range two (2) east; lot two (2), section nineteen (19), township four (4) south, range two (2) east; lot four (4), section nineteen (19), township four (4) south, range two (2) east; south half northeast quarter and northeast quarter southeast quarter section twenty-one (21), township four (4) south, range two (2) east; north half northeast quarter and east half northwest quarter section twenty-one (21), township four (4) south, range two (2) east; north half southwest quarter, northwest quarter and east half section twenty-three (23), township four (4) south, range two (2) east; east half northeast quarter and south half section twenty-five (25), township four (4) south, range two (2) east; lots one (1) and two (2), section thirty-five (35), township four (4) south, range two (2) east; lots three (3), four (4), and five (5), section one (1), township five (5) south, range two (2) east; lots one (1), two (2), three (3), and four (4), section three (3), township five (5) south, range two (2) east; lots two (2) and three (3), section five (5), township five (5) south, range two (2) east; lots one (1), two (2), and three (3), section seven (7), township five (5) south, range two (2) east; east half northeast quarter and lots two (2) and three (3), section eleven (11), township five (5) south, range two (2) east; south half northeast quarter, southeast quarter, and lots two (2), three (3), and four (4), section thirteen (13), township five (5) south, range two (2) east; south half southwest quarter section nineteen (19), township five (5) south, range two (2) east; east half northeast quarter, northeast quarter, southeast quarter, and lots one (1) and two

(2), section twenty-five (25), township five (5) south, range two (2)

east; south half northeast quarter, northwest quarter, and south half section thirty-five (35), township five (5) south, range two (2) east; southeast quarter, east half southwest quarter, and north half section one (1), township six (6) south, range two (2) east; northwest quarter southeast quarter, north half southwest quarter, and north half section three (3), township six (6) south, range two (2) east; all section five (5),

township six (6) south, range two (2) east; all section seven (7), township six (6) south, range two (2) east; southwest quarter northeast quarter, northwest quarter northwest quarter, southeast quarter, north half southwest quarter, and southwest quarter southwest quarter, section nine (9), township six (6) south, range two (2) east; northeast quarter northeast quarter, southwest quarter northeast quarter, southeast quarter northwest quarter, west half northwest quarter, and west half southwest quarter, section eleven (11), township six (6) south, range two (2) east; all section thirteen (13), township six (6) south, range two (2) east; southeast quarter and north half section fifteen (15), township six (6) south, range two (2) east; southeast quarter and north half section seventeen (17), township six (6) south, range two (2) east; all section nineteen (19), township six (6) south, range two (2) east; all section twenty-one (21), township six (6) south, range two (2) east; all section twenty-three (23), township six (6) south, range two (2) east; southwest quarter and north half section twenty-five (25), township six (6) south, range two (2) east; all section twenty-seven (27), township six (6) south, range two (2) east; northwest quarter northeast quarter, and lot one (1), section five

112 (5), township one (1) south, range three (3) east; southwest quarter northeast quarter, northwest quarter, and lot two (2), section five (5), township one (1) south, range three (3) east; north half northeast quarter, section seven (7), township one (1) south, range three (3) east; northwest quarter southwest quarter, section thirteen (13), township one (1) south, range three (3) east; west half northwest quarter, section fifteen (15), township one (1) south, range three (3) east; lots three (3), four (4), and five (5), section seventeen (17), township one (1) south, range three (3) east; lots one (1) and two (2), section seventeen (17), township one (1) south, range three (3) east; lots seven (7) and eight (8), section nineteen (19), township one (1) south, range three (3) east; east half northeast quarter, east half southeast quarter, southwest quarter southwest quarter, and lot two (2), section twenty-one (21), township one (1) south, range three (3) east; west half southeast quarter and east half southwest quarter, section twenty-one (21), township one (1) south, range three (3) east; south half southwest quarter, section twenty-three (23), township one (1) south, range three (3) east; east half northwest quarter, southwest quarter northwest quarter, southwest quarter, east half southeast quarter, and lot one (1), section twenty-five (25), township one (1) south, range three (3) east; northwest quarter, section twenty-seven (27), township one (1) south, range three (3) east; southwest quarter, section twenty-seven (27), township one (1) south, range three (3) east; south half southeast quarter, section twenty-nine (29), township one (1) south, range three (3) east; northeast quarter, north half southeast quarter, and lots one (1), two (2), three (3), and four (4), section twenty-nine

113 (29), township one (1) south, range three (3) east; northwest quarter, section thirty-one (31), township one (1) south, range three (3) east; northeast quarter northeast quarter, west half northeast quarter, and northwest quarter, section thirty-three (33), township one (1) south, range three (3) east; northeast quarter, east half northwest quarter, north half southeast quarter, and north half southwest quarter, section thirty-five (35), township one (1) south, range three (3) east; northeast quarter and east half southeast quarter, section one (1), township two (2) south,

range three (3) east; northwest quarter and west half southwest quarter, section one (1), township two (2) south, range three (3) east; lot two (2), section nine (9), township two (2) south, range three (3) east; east half northeast quarter, east half southwest quarter, and southeast quarter, section eleven (11), township two (2) south, range three (3) east; north half southeast quarter and northeast quarter southwest quarter, section thirteen (13), township two (2) south, range three (3) east; southeast quarter northeast quarter, and northeast quarter southeast quarter, section seventeen (17), township two (2) south, range three (3) east; lot two (2), section twenty-one (21), township two (2) south, range three (3) east; lot number five (5), section twenty-one (21), township two (2) south, range three (3) east; lots three (3), four (4), five (5), six (6), and eight (8), section twenty-three (23), township two (2) south, range three (3) east; lot number five (5), section twenty-five (25), township two (2) south, range three (3) east; lots one (1) and six (6), section twenty-five (25), township two (2) south, range three (3) east; lot number four (4),

114 section twenty-nine (29), township two (2) south, range three (3) east; west half northwest quarter and lots three (3), four (4), five (5), six (6), and seven (7), section thirty-one (31), township two (2) south, range three (3) east; south half southeast quarter and lots three (3), four (4), and five (5), section thirty-five (35), township two (2) south, range three (3) east; lots one (1) and two (2), section thirty-five (35), township two (2) south, range three (3) east; lots three (3), four (4), five (5), six (6), seven (7), eight (8), and eleven (11), section one (1), township three (3) south, range three (3) east; lots one (1), two (2), and three (3), section three (3), township three (3) south, range three (3) east; north half northeast quarter, southeast quarter southwest quarter, and lots one (1), two (2), and three (3), section five (5), township three (3) south, range three (3) east; west half northeast quarter, west half southeast quarter, southwest quarter, and lots one (1), two (2), three (3), and four (4), section seven (7), township three (3) south, range three (3) east; northwest quarter southwest quarter, and lots one (1), two (2), and three (3), section nine (9), township three (3) south, range three (3) east; northwest quarter southeast quarter, and lots five (5), six (6), seven (7), and ten (10), section thirteen (13), township three (3) south, range three (3) east; lots one (1), two (2), three (3), six (6), seven (7), and eight (8), section fifteen (15), township three (3) south, range three (3) east; southwest quarter northwest quarter, and lot one (1), section seventeen (17), township three (3) south, range three (3) east; north half northwest quarter, section nineteen (19), township three (3) south, range three (3) east; northwest quarter northeast quarter, section nineteen

115 ten (19), township three (3) south, range three (3) east; west half southeast quarter section nineteen (19), township three (3) south, range three (3) east; lot one (1), section twenty-three (23), township three (3) south, range three (3) east; lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8), section twenty-five (25), township three (3) south, range three (3) east; southeast quarter northeast quarter, northeast quarter southeast quarter, southwest quarter southeast quarter, and lots one (1), two (2), three (3), four (4), five (5), section twenty-seven (27), township three (3) south, range three (3) east; southeast quarter, south half southwest quarter, northeast quarter northwest quarter, and lots

one (1), two (2), three (3), and four (4), section twenty-nine (29), township three (3) south, range three (3) east; northwest quarter northwest quarter section twenty-nine (29), township three (3) south, range three (3) east; northeast quarter southeast quarter, south half southeast quarter, south half southwest quarter, and northwest quarter southwest quarter section thirty-one (31), township three (3) south, range three (3) east; northwest quarter southwest quarter and northwest quarter section thirty-three (33), township three (3) south, range three (3) east; north half section thirty-five (35), township three (3) south, range three (3) east; north half north half southwest quarter, southeast quarter, and lots one (1), and two (2), section one (1), township four (4) south, range three (3) east; northeast quarter northwest quarter, southwest quarter northwest quarter, northwest quarter, southwest quarter, and south half southeast quarter section three (3), township four (4) south, range three (3) east; north half southeast quarter southwest quarter southeast quarter, and west half section five (5), township four (4) south, range three (3) east; northeast quarter, south half northwest quarter, north half southwest quarter, and lot one (1), section seven (7), township four (4) south, range three (3) east; west half northeast quarter, west half southeast quarter, and northeast quarter northwest quarter section nine (9), township four (4) south, range three (3) east; lots one (1), two (2), and three (3), and northwest quarter northeast quarter section eleven (11), township four (4) south, range three (3) east; northeast quarter, west half southeast quarter, and west half section thirteen (13), township four (4) south, range three (3) east; west half northwest quarter section seventeen (17), township four (4) south, range three (3) east; west half southwest quarter section nineteen (19), township four (4) south, range three (3) east; east half northeast quarter, west half northwest quarter, and south half section twenty-one (21), township four (4) south, range three (3) east; all section twenty-three (23), township four (4) south, range three (3) east; northwest quarter northwest quarter, southwest quarter, and east half section twenty-five (25), township four (4) south, range three (3) east; southwest quarter, west half southeast quarter, and north half section twenty-seven (27), township four (4) south, range three (3) east; east half northeast quarter, southwest quarter northeast quarter northwest quarter northwest quarter, east half southwest quarter, and southeast quarter section twenty-nine (29), township four (4) south, range three (3) east; east half northeast quarter, southwest quarter northwest quarter, and southeast quarter section thirty-one (31), township four (4) south, range three (3) east; north half southeast quarter north half southwest quarter, southwest quarter southwest quarter, and north half section thirty-three (33), township four (4) south, range three (3) east; southwest quarter northeast quarter, south half northwest quarter southwest quarter, and northwest quarter, southeast quarter section thirty-five (35), township four (4) south, range three (3) east; southeast quarter northeast quarter, east half southeast quarter, and southwest quarter southeast quarter section thirty-five (35), township four (4) south, range three (3) east; all section one (1), township five (5) south, range three (3) east; all section three (3), township five (5) south, range three (3) east; south half northeast quarter, south half northwest quarter, southwest quarter, and lots one (1), and two (2), section five (5), township five (5) south, range three (3) east; northeast quarter southeast quarter, northwest quarter

northeast quarter, southwest quarter, north half southeast quarter, southeast quarter of southeast quarter, and lot three (3), section seven (7), township five (5) south, range three (3) east; all section nine (9), township five (5) south, range three (3) east; all section eleven (11), township five (5) south, range three (3) east; all section thirteen (13), township five (5) south, range three (3) east; all section fifteen (15), township five (5) south, range three (3) east; all section seventeen (17), township five (5) south, range three (3) east; southwest quarter northeast quarter, south half northwest quarter, northwest quarter northwest quarter, and south half section nineteen (19), township five (5) south, range three (3) east; all section twenty-one (21), township five (5) south, range three (3) east; all section

118 twenty-three (23), township five (5) south, range three (3) east; all section twenty-five (25), township five (5) south, range three (3) east; all section twenty-seven (27), township five (5) south, range three (3) east; east half southeast quarter, west half southwest quarter, and north half section twenty-nine (29), township five (5) south, range three (3) east; northwest quarter northeast quarter, east half northwest quarter southeast quarter, northeast quarter southwest quarter, and lots one (1) and two (2) section thirty-one (31), township five (5) south, range three (3) east; all section thirty-three (33), township five (5) south, range three (3) east; north half section thirty-five (35), township five (5) south, range three (3) east; all section one (1), township one (1) south, range four (4) east; all section three (3), township one (1) south, range four (4) east; all section eleven (11), township one (1) south, range four (4) east; all section thirteen (13), township one (1) south, range four (4) east; northwest quarter and east half section fifteen, township one (1) south, range four (4) east; northeast quarter section seventeen (17), township one (1) south, range four (4) east; southwest quarter section twenty-three (23), township one (1) south, range four (4) east; northwest quarter and east half section twenty-three (23), township one (1) south, range four (4) east; all section twenty-five (25), township one (1) south, range four (4) east; northeast quarter and west half section one (1), township two (2) south, range four (4) east; north half southeast quarter section one (1), township two (2) south, range four (4) east; east half northeast quarter and northeast quarter southeast quarter, section three (3), township two (2) south, range four (4) east; east half northeast

119 quarter and southeast quarter section seven (7), township two (2) south, range four (4) east; all section nine (9), township two (2) south, range four (4) east; all section eleven (11), township two (2) south, range four (4) east; north half northeast quarter, north half northwest quarter, southwest quarter northwest quarter, northwest quarter southwest quarter, and southeast quarter section thirteen (13), township two (2) south, range four (4) east; all section fifteen (15), township two (2) south, range four (4) east; north half section seventeen, township two (2) south, range four (4) east; north half northeast quarter, southeast quarter northeast quarter, and lots one (1), two (2), and four (4), section nineteen (19), township two (2) south, range four (4) east; northeast quarter northeast quarter and southwest quarter section twenty-one (21), township two (2) south, range four (4) east; north half northeast quarter, northeast quarter northwest quarter, west half northwest quarter, south half southwest quarter, and south half southeast quarter section twenty-

three (23), township two (2) south, range four (4) east; all section twenty-five (25), township two (2) south, range four (4) east; south half northeast quarter, south half northwest quarter, and south half section twenty-seven (27), township two (2) south, range four (4) east; east half northeast quarter, southwest quarter northeast quarter, and southeast quarter southeast quarter section thirty-three (33), township two (2) south, range four (4) east; all section thirty-five (35), township two (2) south, range four (4) east; all section one (1), township three (3) south, range four (4) east; southeast quarter southwest quarter section three (3), township three (3) south, range four (4) east; south half southeast quarter section three (3), township three (3) south, range four (4) east; lots two (2) and three (3), section five (5), township three (3) south, range four (4) east; lots one (1) and two (2), section nine (9), township three (3) south, range four (4) east; all section eleven (11), township three (3) south, range four (4) east; all section thirteen (13), township three (3) south, range four (4) east; southeast quarter northeast quarter, west half northwest quarter, and lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), and ten (10), section nineteen (19), township three (3) south, range four (4) east; north half northeast quarter, southwest quarter northeast quarter, and lots one (1), two (2), three (3), and four (4), section twenty-one (21), township three (3) south, range four (4) east; lots one (1), two (2), three (3), five (5), six (6), and seven (7), section twenty-three (23), township three (3) south, range four (4) east; east half northwest quarter and east half section twenty-five (25), township three (3) south, range four (4) east; west half northwest quarter and south half section twenty-seven (27), township three (3) south, range four (4) east; south half southeast quarter and lots one (1), two (2), three (3), five (5), seven (7), and eight (8), section twenty-nine (29), township three (3) south, range four (4) east; northwest quarter northwest quarter and lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), and nine (9), section thirty-one (31), township three (3) south, range four (4) east; east half and lots one (1), two (2), three (3), four (4), and five (5), section thirty-three (33), township three (3) south, range four (4) east; south half southwest quarter section thirty-five (35), township three (3) south, range four (4) east; southwest quarter and east half section one (1), township four (4) south, range four (4) east; northwest quarter, east half southwest quarter, east half, and lots one (1) and two (2), section three (3), township four (4) south, range four (4) east; northwest quarter northeast quarter, northwest quarter northwest quarter, southwest quarter, and lot one (1), section seven (7), township four (4) south, range four (4) east; southeast quarter southeast quarter and lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), and nine (9), section nine (9), township four (4) south, range four (4) east; northwest quarter, east half southwest quarter, and east half, and lots one (1) and two (2), section eleven (11), township four (4) south, range four (4) east; all section thirteen, township four (4) south, range four (4) east; south half southwest quarter, east half, and lots one (1), two (2), three (3), four (4), and five (5), section fifteen (15), township four (4) south, range four (4) east; southwest quarter northwest quarter, southwest quarter, south half southeast quarter, and lots one (1), four (4), five (5), seven (7), and eight (8),

section seventeen (17), township four (4) south, range four (4) east; south half northeast quarter, and south half northwest quarter, and south half section nineteen (19), township four (4) south, range four (4) east; all section twenty-one (21), township four (4) south, range four (4) east; all section twenty-three (23), township four (4) south, range four (4) east; west half section twenty-five (25), township four (4) south, range four (4) east; all section twenty-seven (27), township four (4) south, range four (4) east; all section twenty-nine (29), township four (4) south, range four (4) east; all section thirty-one (31), township four (4) south, range four (4) east; all section thirty-three (33), township four (4) south, range four (4) east; all section thirty-five (35), township four (4) south, range four (4) east; west half section three (3), township five (5) south, range four (4) east; all section five (5), township five (5) south, range four (4) east; all section seven (7), township five (5) south, range four (4) east; all section nine (9), township five (5) south, range four (4) east; west half section five (5), township one (1) south, range five (5) east; all section seven (7), township one (1) south, range five (5) east; all section seventeen (17), township one (1) south, range five (5) east; all section nineteen (19), township one (1) south, range five (5) east; west half section twenty-one (21), township one (1) south, range five (5) east; all section twenty-nine (29), township one (1) south, range five (5) east; northeast quarter, east half northwest quarter, lot one of northwest quarter, northeast quarter southwest quarter, and southeast quarter section thirty-one (31), township one (1) south, range five (5) east; west half northeast quarter, west half southeast quarter, and west half section thirty-three, township one (1) south, range five (5) east; all section three (3), township two (2) south, range five (5) east; all section five (5), township two (2) south, range five (5) east; southwest quarter northeast quarter, south half northwest quarter, and lots one (1), two (2), three (3), and five (5), section seven (7), township two (2) south, range five (5) east; north half section nine (9), township two (2) south, range five (5) east; west half section eleven (11), township two (2) south, range five (5) east; all section fifteen (15), township two (2) south, range five (5) east; northeast quarter northwest quarter, northwest quarter and south half southwest quarter section seventeen (17), township two (2) south, range five (5) east; west half southeast quarter, northeast quarter and west half section nineteen (19), township two (2) south, range five (5) east; southwest quarter northwest quarter and south half section twenty-one (21), township two (2) south, range five (5) east; west half section twenty-three (23), township two (2) south, range five (5) east; all section twenty-seven (27), township two (2) south, range five (5) east; east half southwest quarter southeast quarter and north half section twenty-nine (29), township two (2) south, range five (5) east; all section thirty-one (31), township two (2) south, range five (5) east; all section thirty-three (33), township two (2) south, range five (5) east; all section three (3), township three (3) south, range five (5) east; all section five (5), township three (3) south, range five (5) east; southeast quarter and north half section seven (7), township three (3) south, range five (5) east; southwest quarter section seven (7), township three (3) south, range five (5) east; southeast quarter section nine (9), township three (3) south, range five (5) east; west half section nine (9), township three (3) south,

range five (5) east; west half section fifteen (15), township three (3) south, range five (5) east; all section twenty-one (21), township three (3) south, range five (5) east; all section seventeen (17), township three (3) south, range five (5) east; all section nineteen (19), township three (3) south, range five (5) east; all section twenty-nine (29), township three (3) south, range five (5) east; north half section thirty-one (31), township three (3) south, range five (5) east; south half section thirty-one (31), township three (3) south, range five (5) east; northwest quarter section thirty-three (33), township three (3) south, range five (5) east; all section seven (7), township four (4) south, range five (5) east; south half section thirty-five (35), township five (5) south, range three (3) east; east half section twenty-five (25), township four (4) south, range four (4) east; all section one (1), township two (2) south, range five (5) east; east half section eleven (11), township two (2) south, range five (5) east; all section thirteen (13), township two (2) south, range five (5) east; east half section twenty-three (23), township two (2) south, range five (5) east; all section twenty-five (25), township two (2) south, range five (5) east; all section thirty-five (35), township two (2) south, range five (5) east; all section one (1), township three (3) south, range five (5) east; all section eleven (11), township three (3) south, range five (5) east; all section thirteen (13), township three (3) south, range five (5) east; east half section fifteen (15), township three (3) south, range five (5) east; all section twenty-three (23), township three (3) south, range five (5) east; north half northeast quarter, north half northwest quarter section twenty-five (25), township three (3) south, range five (5) east; south half northeast quarter, south half northwest quarter and south half section twenty-five (25), township three (3) south, range five (5) east; south half northeast quarter, south half northwest quarter and south half section twenty-seven (27), township three (3) south, range five (5) east; north half northeast quarter and north half northwest quarter section twenty-seven (27), township three (3) south, range five (5) east; northeast quarter section thirty-three (33), township three (3) south, range five (5) east; south half section thirty-three (33), township three (3) south, range five (5) east; all section thirty-five (35), township three (3) south, range five (5) east; all section one (1), township four (4) south, range five (5) east; all section three (3), township four (4) south, range five (5) east; all section five (5), township four (4) south, range five (5) east; all section nine (9), township four (4) south, range five (5) east; all section eleven (11), township four (4) south, range five (5) east; all section thirteen (13), township four (4) south, range five (5) east; all section fifteen (15), township four (4) south, range five (5) east; all section seventeen (17), township four (4) south, range five (5) east; all section twenty-one (21), township four (4) south, range five (5) east; all section twenty-three (23), township four (4) south, range five (5) east; northeast quarter section twenty-seven (27), township four (4) south, range five (5) east, be, and the same hereby are, canceled and decreed null and void.

II.

That the deed warranty in form, executed February 26th, 1880, by defendant The Oregon and California Railroad Company, to defendant John A. Hurlburt for the southeast quarter and the south half of the

northeast quarter of section number three (3), township number one (1) south, range four (4) east, in Multnomah County, Oregon, be, and the same hereby is, canceled and decreed null and void.

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III.

That the several deeds numbered in the bill herein, to wit, the deed from the defendant The Oregon and California Railroad Company, to Jacob Goldstrap, of date November 5th, 1879, the deed by Jacob Goldstrap to Sylvester Evans, and the deed from Sylvester Evans to Thomas L. Evans, of date July 13th, 1883, all purporting to convey title to the northeast quarter of the northeast quarter and the east half of the northwest quarter of the northeast quarter of section three (3), township one (1) south, range four (4) east, in Multnomah County, Oregon, be, and the same hereby are, canceled and decreed null and void.

And it is further ordered, adjudged, and decreed that the costs, disbursements, and charges of this suit, taxed at \$, be paid by defendant, The Oregon and California Railroad Company, and that complainant, The United States, have judgment therefor.

W. B. GILBERT, *Judge*.

(Endorsed:) Filed Sept. 9, 1895. J. A. Sladen, clerk.

And afterwards, to wit, on the 9th day of September, 1895, there was duly filed in said court an opinion in words and figures as follows, to wit:

127 In the circuit court of the United States for the district of Oregon. September 9, 1895.

THE UNITED STATES

vs.

OREGON & CALIFORNIA RAILROAD
Company et al.

No. 1982. In equity.

Opinion of the court on final hearing.

Suit by the United States against the Oregon & California Railroad Company, John A. Hurlburt, and Thomas L. Evans, to cancel patents and restore land to the public domain. On final hearing. Decree for the complainant.

John M. Gearin and George H. Williams for the United States; W. D. Fenton and L. E. Payson for the defendant corporation.

GILBERT, circuit judge:

By this suit the United States seek to cancel certain patents issued to the Oregon & California Railroad Company of lands within the State of Oregon claimed by said company to have been earned under the terms of the act of Congress of July 25, 1866, granting it lands to aid in the construction of a line of railroad beginning at Portland, in the State of Oregon, and running thence south to the southern boundary of the State. It is alleged in the bill that the same lands had been granted to the Northern Pacific Railroad Company in the grant to that company

128 of July 2, 1864, and hence were not within the purview of the later grant. The cause was first heard upon a demurrer to the bill, and many of the questions involved in the suit were at that time considered and disposed of. (*United States v. Oregon & California Railroad Company et al.*, 57 Fed., 890.) The case now comes on to be heard upon the issues thereafter made by the answer of the defendant corporation, and the proofs which were thereupon taken. It is shown that the map filed by the Northern Pacific Railroad Company on the 13th day of August, 1870, and which upon the decision of the demurrer was assumed to be a map of definite location, was not such, but was a map of the general route of the line of that company's road. Upon that fact, so established by the proof, and not disputed by the complainant, it is now urged by the defendants that the land in controversy in this suit passed to the Oregon & California Railroad Company by virtue of its grant. Its contention is that the lands never were taken from the public domain by the grant to the Northern Pacific Railroad Company, for the reason that the title never passed to that company, and that such title could never pass until there was a definite location of the road; that by the act of definitely locating the line the grantee of the railroad lands selects the granted lands from the mass of public lands among which it has the right to choose, and designates those to which the title passes, and that without such definite location of line and consequent selection of lands no title is vested; that notwithstanding the settled doctrine of the decisions that the grant is in presenti, it is nevertheless not in
 129 presenti as to any particular lands until by the act of the grantee it is made certain what lands are to be taken. It is proven that there was never a definite location of the branch line of the Northern Pacific Railroad. The lands in controversy in this suit lie within the place limits of a line of road such as that indicated by the maps of general route of 1865 and 1870. The decision of the case on final hearing must therefore depend upon the effect of the language of the act granting land in aid of the branch line and the filing of the preliminary maps of that line.

It is unnecessary here to repeat the language of the grant further than to say that it was a grant of public lands, and that it authorized the company to build and operate a continuous road, beginning at Lake Superior and running thence westerly to some point on Puget Sound, "with a branch line via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than 300 miles from its western terminus." There can be no doubt that if by the terms of the act the line of the branch road had been definitely fixed as running upon a certain line, or upon a straight line between two designated points, the title would have passed from the date of the grant and its acceptance by the grantee, for there would be no need of further or more definite location. The description of the branch line as contained in the act does not, it is true, fix its point of beginning or ending, nor definitely determine the location of any portion thereof. It is evident, however, that the valley of the Columbia River, for a large portion of the route which
 130 would necessarily be covered by such a branch line, is so narrow that the road must have followed either the north or the south

bank of the river, and it will not be disputed that a road built in compliance with the terms of the grant, and on the line therein defined, would have been confined to a narrow strip of territory. By both the map of 1865 and the map of 1870 it follows the north bank of the river. The company had the right to choose either bank, but it never exercised that right by making a definite location of the road. Were the lands, therefore, under the terms of the act, granted lands, and hence not public lands, from the date of the grant, and were they on that account excluded from the subsequent grant to the defendant corporation? It is not necessary that the title should have passed to the Northern Pacific Railroad Company in order that the lands should be placed in such attitude to the public domain as to be excluded from a subsequent grant in aid of another railroad. It is enough if they were in any way segregated from the public lands so that at the date of the junior grant it will be presumed to have been the intention of Congress to exclude them from its operation.

I hold that it was such segregation to set apart a larger area within which the lands granted to the Northern Pacific Company were to be selected by it. It was sufficient if the lands in controversy in this suit were subject to the contingency of being within the place limits of the branch line whenever that line should receive its definite location. Said the court in *Bardon vs. N. P. R. R. Co.* (145 U. S., 538): By public land "is meant such land as is open to sale or other disposition
131 under the general laws. All land to which any claim or rights of others have attached does not fall within the designation of public lands."

In *Wilcox vs. Jackson* (13 Pet., 513), it was said that: "Whosoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it or to operate upon it, although no reservation were made of it."

If the Northern Pacific branch road had been located on any possible line within the terms of the act, so as to go by way of the Columbia River valley to a point at or near Portland, the greater portion at least of the lands in controversy would necessarily have fallen within its place limits. It is clear that Congress did not intend that the grant to the Northern Pacific Company should be abridged or impaired by the subsequent grant to the Oregon & California Company, nor that any portion of the subsidy to the latter company should depend upon the contingency of the failure of the former company to definitely locate its line of road, nor did it intend to give to the latter company lands that had been set apart for the former—lands within which the Northern Pacific Company had the right to earn the subsidy given it by the act.

The defendants rely upon the case of *Carr vs. Quigley* (149 U. S., 652), to sustain their contention that the whole tract from which the branch-line grant could be satisfied was not set apart from the public lands by the granting act, so as to be without the scope of the subsequent grant to the Oregon & California Railroad Company. In that case the court applied and affirmed the doctrine of *Newhall vs. Sanger* (92 U. S., 761), in which it was held that a grant to a
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railroad company of lands not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have been attached at the time the line of the road was definitely fixed, and providing that such grant shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation, or mineral lands, or the improvements of any bona fide settler, did not include lands within the boundary of an alleged Mexican or Spanish grant which was sub judice at the time the Secretary of the Interior ordered a withdrawal of the lands along the route of the road; that lands within such boundaries of such alleged grant, being thus under consideration in the courts, are not public lands within the meaning of the acts of Congress in making grants to aid the construction of works of internal improvement. In the *United States vs. McLaughlin* (127 U. S., 449) the court had under consideration the conflicting rights of the Central Pacific Railroad Company, of California, under a grant similar to that of the Northern Pacific Railroad Company in this case, and the grantees under a Mexican grant of a certain quantity of land to be located within the limits of a larger area. It was held that the fact that the Mexican grant was sub judice at the time of the grant to the railroad company did not exclude the whole of the larger area from which it was to be taken from the operation of the railroad grant; but the controlling reason of the decision was declared to be the fact that the right to locate the smaller area within the greater was not vested in the donee of the grant, but remained in the United States, and the further fact that, notwithstanding the grant to aid the railroad company, there still remained within the described area sufficient land to meet the demands of the grant. The court said: "It is in the option of the Government, not of the grantee, to locate the quantity granted; and, of course, a grant by the Government of any part of the territory contained within the outside limits of the grant only reduces by so much the area within which the original grantee's proper quantity may be located. If the Government has a right to say where it shall be located, it certainly has the right to say where it shall not be located; and if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains 80 leagues and the quantity granted is only 10 leagues, the Government may dispose of 70 leagues without doing any wrong to the original grantee. In *Carr vs. Quigley* the same question was again considered by the court, and the doctrine of the *United States vs. McLaughlin* was expressly approved.

It is contended that the implied doctrine of those decisions is that the rule there announced applies likewise to cases where the right of selection is vested, not in the United States, but in the railroad company. Such is not perceived to be their meaning. It is rather the distinct doctrine of those cases that it was only because the United States had a right to make the selection of the granted quantity of land within the larger area called for in the Mexican grant that a portion of the described tract was held to be subject to the subsequent grant of the railroad company, and that otherwise the court would have

considered the whole tract, so set apart and subjected to the right of the grantee, excluded from the public lands and not included within the grant of lands in aid of works of internal improvement. The inference is that if the right of selection had been vested in the grantee of the Mexican grant the whole tract would have remained subject to his right, and therefore not subject to a subsequent grant so long as the first right existed. A defined tract of land out of which a smaller area has been granted, the location of which is to be made by the grantor, is in a widely different condition, so far as concerns the grantor's right, from a tract in which the right to select the granted portion is vested in the grantee. In the former case a subsequent grant to another of a portion of the described area is only an exercise of the grantor's right of selection. It is his declaration that the portion so subsequently bestowed by him upon another has been eliminated from the described tract and has been taken from the lands out of which the first grant is to be satisfied. In the case of the Mexican grants this power of selection remained in the United

States. Its exercise in no way contradicted or subverted the terms
135 of the grant, or abridged the rights of the grantee thereunder.

It is not so in the case of railroad land grants such as those under consideration in this case. The United States had not the right to locate the lands granted to aid the Northern Pacific Railroad Company. The grant to that company carried to the grantee the right to make selection of the granted lands. It might definitely locate its line in good faith, in compliance with the requirement of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. It is unimportant that the company never exercised this power. The right was established by the act, and it still subsisted when Congress, by a later grant, bestowed lands in aid of the construction of the Oregon & California Railroad.

But at the date of the grant to the Oregon & California Railroad Company the lands in controversy herein were not only affected by the fact of the prior grant to aid the branch line of the Northern Pacific road, but that company had upon March 6, 1865, filed in the General Land Office its map of the general route of its road, and had thereupon asked for a withdrawal of the granted lands within the prescribed area upon both sides of its line. The map so filed, known as the "Perham" map, was not satisfactory to the Commissioner of the General Land Office, and he notified the company that it was disapproved, first, because it did not show the exact location, "indicating by flagstuffs the progress of the survey," nor the "precise portions of each section or smallest legal subdivision cut by the road;" and, second, because it was not filed in the district
136 land offices as well as in the General Land Office. These were not valid objections. It has never been held that the map of general route must show a line definitely located upon the ground with all the accuracy of a final survey. It has been considered sufficient if "its general course and direction are determined after an actual examination of the country or from a knowledge of it, and it is designated by a line on the map showing the general features of the adjacent country and the places through or by which it will pass." (*Buttz vs. Railroad Company*, 119 U. S., 55.) It would have been impossible at that time to have made a map of the branch line such as was required by the Com-

missioner. The court will take knowledge of the fact that at that date a large portion of the public lands on the line of the road were unsurveyed. By the Perham map the position of the branch line is indicated with reference to the Columbia River. By the scale of the map its distance from that river at any point is approximately ascertainable. If a withdrawal of the granted lands within the place limits upon both sides of the general route so selected had been ordered by the Commissioner of the General Land Office there can be no doubt that the effect of such action would have been to segregate the withdrawn lands from the public lands subject to disposal by subsequent grant, and would have operated to reserve them therefrom. Were the rights of the company affected by the fact that the Commissioner of the General Land Office erroneously found the map unsatisfactory for the reasons above stated and notified the company of his disapproval? The Supreme Court has held that "when the general route of the road is thus fixed in good faith, and information thereof
 137 given to the land department by filing a map thereof with the Commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or preemption the odd sections, to the extent of 40 miles on each side." (*Buttz vs. Railroad Co.*, *supra*.) While it is true that in the case just cited there is no direct ruling upon the question of the power of the Commissioner of the General Land Office and the effect of his approval or rejection of a map, the clear import of the language of the opinion is that the Commissioner is not clothed with power to affect the rights of the railroad company, and it would seem that upon the filing of a map, which, in fact, complies with the law and is filed in good faith, the law itself operates to withdraw the granted lands.

It is further urged that the Perham map was defective for reasons other than those stated by the Commissioner of the General Land Office in his letter disapproving the same; that that portion of the line by way of the Columbia River valley does not end at a point "at or near Portland," but continues in an unbroken line to the waters of Puget Sound, and that it is not designated upon the map as a branch line, and that, so far as the map indicates, it appears to be a main line. The act gave authority, together with a right of way and a subsidy, to build a main line from Lake Superior to the waters of Puget Sound and a branch line as heretofore indicated. In the map there is no designation of either line as the main line or the branch line. So far as the map locates the road west of the Rocky Mountains, it complies strictly with the terms of
 138 the act, with the exception that the line by the Columbia River valley, instead of ending at a point at or near Portland, proceeds further and ends at the waters of Puget Sound. The fact that the construction of a road from Portland to Puget Sound was not authorized by the grant does not impair the validity of the location of that part of the road which was authorized and which was located in compliance with its terms; and it is immaterial that the main line and the branch line are not so respectively designated upon the map. They are in the location called for by the language of the *granting* act, and it will be presumed that they are located in pursuance thereof. This map had been on file for more than a year when the grant to the Oregon and California Railroad was made, and it not only furnishes evidence of the loca-

tion of the general route of the line of the Northern Pacific branch line, and of the consequent segregation of those lands from the public lands by operation of law, but it was notice to the Oregon and California Railroad Company of the prior grant and the prior bestowal of these lands in aid of another road.

But it is conceded that the map of 1865 was ineffective to accomplish the withdrawal of lands, and that its rejection by the Commissioner of the Land Office is a conclusive adjudication of its insufficiency; the map of 1870 was open to no such objection. Upon its receipt in the Land Office the withdrawal of lands was made upon the records. No reason is seen why the map of general route which is required by the act, even if filed after the date of the junior grant, does not, so far as the junior grant is concerned, serve to sufficiently identify the lands covered by the prior grant. It is true

139 that after filing the map of general route of 1870, the Northern Pacific Company still possessed the right to change the line whenever it should make its definite location thereof, and that it was required by the act to file such map of definite location for the purpose of finally indicating the lands that were to be patented to it. But until such final map was filed, the map of general route, whereby the withdrawal was in fact accomplished, served to sufficiently identify the granted lands, notwithstanding the reserved right to alter its location. In the absence of such map of final location, and until the same is filed, it is a reasonable presumption that the granted lands are those which have been withdrawn in pursuance of the filings of the map of general route, as required under the terms of the grant.

In any view of the case, I find no warrant for holding that it was the intention of Congress to grant these lands to the Oregon and California Railroad Company. A decree will be entered for the United States, as prayed for in the bill.

(Signed)

W. B. GILBERT, *Judge*.

(Endorsed :) Filed September 9, 1895. J. A. Sladen, clerk.

And, afterwards, to wit, on the 30th day of December, 1895, there was duly filed in said court a petition for appeal and assignment of error, in words and figures, as follows, to wit:

140 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, COMPLAINANT,

vs.

THE OREGON & CALIFORNIA RAILROAD COMPANY,

John A. Hurlburt, and Thomas L. Evans, defendants.

} In equity.

Petition on appeal.

The defendants above named, conceiving themselves aggrieved by the decree rendered in the above-entitled cause, on September 9th, 1895, in the above-entitled court, and thereafter filed and entered as of that date, do hereby appeal from the said decree to the United States circuit court of appeals for the ninth circuit, for the reasons specified in the assignment of errors, which is filed herewith; and they pray that this appeal

may be allowed, and that a transcript of the record proceedings and paper, upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth district.

(Sgd.) BRONAUGH, McARTHUR, FEXTON & BRONAUGH,
Solicitors for said Defendants.

Dated December 30th, 1895.

141 The foregoing claim of appeal is allowed this 30th day of December, 1895.

(Sgd.) WM. B. GILBERT,
Circuit Judge for the Ninth Circuit.

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, COMPLAINANT,	}
<i>vs.</i>	
THE OREGON AND CALIFORNIA RAILROAD COMPANY, John A. Hurlburt, and Thomas L. Evans, defendants.	

Assignment of errors on appeal.

The appellants and defendants above named by the undersigned, in connection with their position on appeal, herein say that the decree in this cause is erroneous and against their just rights, in the following particulars:

I.

The court erred in overruling the demurrer to the bill of complaint, which said demurrer was for and on the part of all of the defendants in said cause in this, that the said bill of complaint does not disclose any equities in the complaint, which entitled it to any relief.

II.

The court erred in deciding that the lands in suit were granted 142 and intended to be granted to the Northern Pacific Railroad Company by the act of Congress of July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route," in this,

1st. Because the pleadings and exhibits thereto and the evidence show that the lands described in the bill of complaint and in the patents referred to therein were granted to the appellant, the Oregon & California Railroad Company, by the act of Congress of date July 25, 1866, under an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon."

2nd. Because the pleadings and exhibits thereto, and the evidence show that the Northern Pacific Railroad Company did not file any map of definite location at any time between Wallula, on the Columbia River, by way of the Columbia River Valley, to Puget Sound, or to a point at

or near Portland, or affecting the lands described in the bill of complaint, or construct any road opposite to or coterminous with said lands.

3d. Because the pleadings and exhibits thereto, and the evidence show that the only maps filed by the Northern Pacific Railroad Company in the General Land Office, or Department of the Interior, claimed to affect the lands described in the bill of complaint, were maps of general route, filed August 13, 1870, and long after said lands had been granted to the Oregon & California Railroad Company under said act of Congress, of date July 25, 1866.

143 4th. Because the pleadings and exhibits thereto and the evidence show that the maps filed with the bill of complaint, marked "Exhibit C," and known and described as the Perham map, pretended by the complainant to be a map of general route of the line of said Northern Pacific Railroad Company, was made and filed without surveying or marking the line of the proposed railroad upon the ground, or of any knowledge of the country through which said map pretended to trace any line of any railroad, and that said map contained thereon two conjectural and imaginary route lines, and the said map is void because indefinite and not authorized by the act of Congress of July 2nd, 1864, and was thereafter abandoned and waived by the Northern Pacific Railroad Company.

5th. Because the pleadings and exhibits thereto and the evidence further show that the said map marked "Exhibit C," known and described as the Perham map, was rejected by the Commissioner of the General Land Office as void and ineffective, and such rejection was acquiesced in and assented to by the Northern Pacific Railroad Company, and because, as a matter of law, the said map did not have and could not have any effect upon the lands described in the bill of complaint or any part thereof.

6th. Because the pleadings, exhibits thereto, and the evidence show that certain of the lands described in the bill of complaint, and in the patents therein referred to, are distant more than twenty miles from each and every line for a railroad shown or pretended to be designated on the said map "Exhibit C."

The court erred in decreeing and adjudging that the patents in said bill of complaint mentioned and described were void and of no force and effect, and that they should be set aside, canceled, and annulled in so far as they affected the lands described in the bill of complaint, and in decreeing and adjudging that the conveyances to said defendants, John A. Hurlburt and Thomas L. Evans, and their grantors, should be set aside, canceled, and annulled, and that the defendants took nothing by the said conveyances of the said parcels of lands as claimed by said defendants in said bill of complaint, in this:

1st. Because the pleadings and exhibits thereto and the evidence showed that the said patents were issued to the said Oregon & California Railroad under and in pursuance of said act of Congress of July 25, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad Company

in California to Portland, in Oregon, and because said lands were ceded by said Oregon and California Railroad Company, under said grant, by the construction of said road in accordance therewith, and because said lands conveyed to said defendants, Hurlburt and Evans, were a part of said grant, and they were at the date of said decree the owners in fee simple of the premises described in the said conveyances.

2nd. Because the pleadings and exhibits thereto and the evidence show that the said lands described in the said patents and in the bill of complaint mentioned were on July 25, 1866, public lands of the United States subject to grant to the said Oregon & California Railroad Company, and had not been theretofore reserved, sold, or granted by the United States.

IV.

The court erred in decreeing and adjudging that the lands described in the complaint and in the patents therein mentioned were on the 2d day of July, 1864, granted by act of Congress to the Northern Pacific Railroad Company, under an act of Congress of said date, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route," and that the same were forfeited to the United States by act of Congress of date Sept. 29th, 1890, entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes," and that the said lands on and after the said date last mentioned became and were and are public lands of the United States, in this:

1st. Because the pleadings and exhibits thereto and the evidence show that the lands described were never at any time withdrawn by the Land Department of the United States, or other lawful authority, or affected by any act of the Northern Pacific Railroad Company, or withheld or withdrawn from sale, grant, or disposition by the United States on July 25, 1866, under said grant to the Oregon & California Railroad Co.

146 2nd. Because the pleadings and exhibits thereto and the evidence show that nothing was done by the Northern Pacific Railroad Company under said act of Congress of July 2nd, 1864, which in anywise affected any of the lands described in the bill of complaint.

3rd. Because the Northern Pacific Railroad Company under said act of Congress of July 2nd, 1864, had no power or authority to locate any line of its railroad by way of the Columbia River Valley to Puget Sound until after the joint resolution of Congress of May 31st, 1877, and because the pleadings and exhibits thereto and the evidence show that no map of any kind indicating any branch line under said act of July 2nd, 1864, was ever filed by the Northern Pacific Railroad Company, and because said Perham map does not indicate or designate the location of any branch line whatever, and because on Sept. 29th, 1890, all said lands described in the bill of complaint and in the patents therein mentioned had been theretofore and on July 25th, 1866, granted to the Oregon & California Railroad Company under said act of Congress of that date.

4th. Because the pleadings, exhibits thereto, and the evidence show that certain of the lands described in the bill of complaint, and in t

patents therein referred to, are within and comprise a part of the indemnity lands grant made by the said act of July 25th, 1866, to the appellant, the Oregon and California Railroad Company; and even if it were true that such lands were or could have been in anywise affected by the said act of July 2nd, 1864, or the said map, "Exhibit C," such effect was extinguished and removed by the said act of September 29th, 1890; and at all times after September 29th, 1890, even if not at any time prior thereto, the appellant, the Oregon and California Railroad Company, was fully entitled that patents issue conveying all of such lands to it.

V.

The court erred in decreeing and adjudging that the maps of August 13, 1870, or either of them, designated in said bill of complaint as "Exhibit K," filed by the Northern Pacific Railroad Company, operated upon or had any effect in relation to the lands described in the bill of complaint, or any patents mentioned therein, in this:

1st. Because the pleadings and exhibits thereto and the evidence show that said maps were maps of general route only, and made and filed as such only by the said Northern Pacific Railroad Company, and made and filed by the Northern Pacific Railroad Company in pursuance of and by virtue of the authority of a joint resolution of Congress, of date May 31, 1870, and not otherwise; and

2nd. Because the pleadings and exhibits thereto and the evidence show that said maps of August 13, 1870, were not maps of definite location, and the Northern Pacific Railroad Company never at any time filed any maps of definite location opposite to or coterminous with any of the lands described in the bill of complaint or within forty miles of any part thereof.

VI.

The said court erred in adjudging and decreeing that said Northern Pacific Railroad Company, under said act of Congress of July 2nd, 1864, was granted any lands over or upon its branch line by way of the Columbia River Valley to a point at or near Portland, in this:

1st. Because as matter of law there was no grant made, or intended to be made, to the Northern Pacific Railroad Company of any lands whatsoever for its said branch line.

VII.

The court erred in not decreeing and adjudging that the lands in suit were granted to the appellant, The Oregon & California Railroad Company, in this:

1st. Because the pleadings and exhibits thereto and the evidence show that the said lands described in the bill of complaint, and in the patents therein mentioned, were granted to the Oregon & California Railroad Company by the act of July 25th, 1866.

2nd. Because the pleadings and exhibits thereto and the evidence show that said lands were earned by said Oregon & California Railroad Company by the construction of its road under said act of July 25, 1866,

and that the constructed portion of said road was thereupon duly accepted by the President of the United States, as in performance of said grant, and the patents in said bill of complaint mentioned were thereupon duly issued to the said Oregon & California Railroad Company, and the said Oregon & California Railroad Company then and thereby became the owner in fee simple of the said premises and the whole thereof.

VIII.

The court erred in decreeing a cancellation of the patents issued,
149 described in the bill of complaint, conveying the lands mentioned therein to the Oregon & California Railroad Company, in this :

1st. Because the pleadings and exhibits thereto and the evidence show that each of said patents so duly and properly issued for lands granted to the said company by the act of July 25, 1866, and for which it was then duly entitled, were patents issued under said act aforesaid.

Wherefore the defendants and appellants pray that the decree herein appealed from be reversed and that the circuit court be directed to enter a decree dismissing the bill of complaint of the complainant.

(Sgd.)	BRONAUGH, McARTHUR, FENTON & BRONAUGH,
	<i>Solicitors for Appellants.</i>
(Sgd.)	E. C. BRONAUGH,
	L. L. McARTHUR,
	W. D. FENTON,
	E. C. BRONAUGH, Jr.,
	<i>Of Counsel.</i>

DISTRICT OF OREGON, ss :

Due service of the within petition and assignment of errors is hereby accepted in Multnomah County, Oregon, this 30th day of December, 1895, by receiving a copy thereof, duly certified to as such by W. D. Fenton, one of attorneys for defendants.

DANIEL R. MURPHY,
United States Attorney.

(Endorsed :) Filed December 30th, 1895. J. A. Sladen, clerk.

150 And afterwards, to wit, on Monday, the 30th day of December, 1895, the same being the 71st judicial day of the regular October term of said court—present, the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said case, to wit :

In the circuit court of the United States for the district of Washington.

THE UNITED STATES, COMPLAINANT,	}
<i>vs.</i>	
THE OREGON AND CALIFORNIA RAILROAD	
Company, John A. Hurlburt, and Thomas	
L. Evans, defendants.	

Order allowing appeal.

Now on this day come the Oregon & California Railroad Company and John A. Hurlburt and Thomas L. Evans, defendants, by W. B.

Fenton, one of their solicitors in the above-entitled suit, and in open court respectfully move and petition the court that the said Oregon & California Railroad Company, John A. Hurlburt, and Thomas L. Evans, and each of them, be allowed and granted an appeal to the United States circuit court of appeals for the ninth circuit from the decree of this court in this cause, made and entered at the present term of said court and on the 9th day of September, 1895, in favor of the United States, complainant, and against the said defendants, adjudging and

151 decreeing that the patents described, in so far as they affect the lands in the bill of complaint described, be set aside, canceled, and annulled, and that said lands never were the property of either of said defendants or of said railroad company, but that the same are forfeited to the United States and become public lands of the United States by the provisions of the act of Congress of September 29th, 1890, entitled, "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes," and decreeing that the deeds to said defendants John A. Hurlburt and Thomas L. Evans should be set aside, canceled, and held for naught, and decreeing and adjudging that said lands described and mentioned in the bill of complaint were not granted to the Oregon & California Railroad Company by act of Congress, of date July 25th, 1866, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon."

Whereupon it is ordered that said appeal be allowed as prayed, and that the said defendants be, and they are and each of them is hereby, allowed to appeal from said decree to the United States circuit court of appeals for the ninth circuit, and a citation issue and be served as by law provided, as prayed for in said petition, upon giving their bond with sureties, to be approved by the judge making this order, in the sum of one thousand dollars.

Dated December 30, 1895.

(Sgd.)

WM. B. GILBERT, *Judge*.

152 (Endorsed:) Filed Dec. 30, 1895. J. A. Sladen, clerk.

And afterwards, to wit, on the 30th day of December, 1895, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, COMPLAINANT,

vs.

THE OREGON & CALIFORNIA RAILROAD COMPANY,

John A. Hurlburt, and Thomas L. Evans, defendants.

Bond on appeal.

Know all men by these presents that we, The Oregon & California Railroad Company, and John A. Hurlburt, Thomas Evans, principals, and R. Kohler and L. R. Fields, sureties, of Portland, Oregon, are held

and firmly bound unto the United States, complainant, in the sum of one thousand dollars, to be paid to the said United States, executors, or administrators. To which payments, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated December 30th, 1895.

153 Whereas, the above-named Oregon and California Railroad Company, John A. Hurlburt, and Thomas L. Evans have been allowed an appeal to the United States circuit court of appeals for the ninth circuit to reverse the decree in the above-entitled cause by the circuit court of the United States for the district of Oregon, rendered September 9th, 1895:

Now, therefore, the condition of this obligation is such that if the above-named Oregon and California Railroad Company, John A. Hurlburt, and Thomas L. Evans shall prosecute said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE OREGON & CALIFORNIA RAILROAD COMPANY.
(By R. KOEHLER, *Second Vice-President*.)
JNO. A. HURLBURT.
THOS. L. EVANS.
R. KOEHLER.
L. R. FIELDS.

Signed, sealed, and delivered in presence of W. D. Fenton.

UNITED STATES OF AMERICA, *District of Oregon*, ss:

I, R. Koehler, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth in property situated therein the sum of two thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

R. KOEHLER.

154 Subscribed and sworn to before me the 30th December, 1895.

[SEAL.]

W. D. FENTON,
Notary Public for Oregon.

UNITED STATES OF AMERICA, *District of Oregon*, ss:

I, L. R. Fields, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth in property situated therein the sum of two thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

L. R. FIELDS.

Subscribed and sworn to before me this 30th December, 1895.

[SEAL.]

W. D. FENTON,
Notary Public for Oregon.

(Endorsed:) Filed Dec. 30, 1895. J. A. Sladen, clerk. Approved December 30th, 1895. Wm. B. Gilbert, judge.

And afterwards, to wit, on the 30th day of December, 1895, there was duly filed in said court a stipulation in words and figures as follows, to wit:

155 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, COMPLAINANT,	}
<i>vs.</i>	
THE OREGON & CALIFORNIA RAILROAD	
Company, John A. Hurlburt, and Thomas	
L. Evans, defendants.	

Stipulation that certain original exhibits be forwarded to U. C. A.

The parties to this suit, acting by and through their respective solicitors in order to save expense, insure greater accuracy, and expedite the transmission of the record in this cause to the United States circuit court of appeals for the ninth circuit, upon appeal from the decree rendered by the above-entitled court in this cause on September 9th, 1895, hereby stipulate and agree that by consent and leave of the court each and all of the original maps, letters, papers, documents, writings, and exhibits introduced in evidence or referred to in the pleadings, together with the original testimony taken and returned by the special examiner in said

156 cause, may and shall be certified and sent up to the said appellate court by the clerk of this court to be used and read in this cause on the hearing of such appeal.

Dated.

(Signed.) DANIEL R. MURPHY,
District Attorney and Solicitor for Complainant.
 BRONAUGH, McARTHUR, FENTON & BRONAUGH,
Solicitors for Defendants.

(Endorsed:) Filed December 30, 1895. J. A. Shaden, clerk.

And afterwards, to wit, on Monday, the 30th day of December, 1895, the same being the 71st judicial day of the regular October term of said court—present, the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, COMPLAINANT,	}	December 30, 1895.
<i>vs.</i>		
THE OREGON & CALIFORNIA RAILROAD		
Company, John A. Hurlburt, and Thomas		
L. Evans, defendants.		

Order to forward original exhibits.

Now at this day come the parties to this suit, by their respective solicitors, and present their written stipulation on file herein, wherein it is stipulated and agreed that by consent and leave of the court each and all of the original maps, plats, letters, papers, documents, writings, and exhibits introduced in evidence, annexed to and

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referred to in the pleadings, together with the evidence and exhibits returned into court by F. S. Lafferty, special examiner in this cause, may be certified and sent up to the United States circuit court of appeals for the ninth circuit, and it being apparent to this court that the said original maps, plats, letters, papers, documents, writings, and exhibits have been and were prepared in the General Land Office and certified therefrom, and are printed official documents of known verity:

It is therefore ordered and directed that the clerk of this court do certify and transmit to the said appellate court all said original maps, plats, letters, papers, documents, writings, exhibits, and evidence as a part of the record and transcript of this cause at the same time he transmits copies of the remainder of the records and transcript in this cause to the said appellate court.

(Sgd.)

GILBERT, *Judge*.

(Endorsed:) Filed December 30th, 1895. J. A. Sladen, clerk.

Clerk's certificate to transcript.

DISTRICT OF OREGON, ss:

I, J. A. Sladen, clerk of the United States circuit court for the district of Oregon, do hereby certify that the foregoing transcript of record on appeal in cause No. 1982, The United States vs. The Oregon and California Railroad Company, John A. Hurlburt, and Thomas L.

Evans, is a full, true, and correct transcript of said record as the same appears at my office and in my custody, except such original papers, documents, and exhibits as are transmitted to the appellate court by order of said circuit court.

I further certify that the cost of the foregoing transcript is one hundred twenty-one 60-100 dollars, and that the same has been paid by the defendants, The Oregon and California Railroad Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this 2nd day of January, 1896.

[SEAL.]

J. A. SLADEN,

Clerk United States Circuit Court, District of Oregon.

(Endorsed:) No. 275. United States circuit court of appeals for the ninth circuit. The Oregon and California Railroad Company, John A. Hurlburt, and Thomas L. Evans, appellants, vs. The United States. Transcript of record. Appeal from the circuit court of the United States for the district of Oregon. Filed January 8th, 1896. F. D. Monckton, clerk.

159 S. S. M.

Exhibit 1 to amendment to bill.

W. J. M.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 20, 1897.

I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that, as appears on a full and complete examination of the records and files of the General Land Office, no map of the definite location of the Northern Pacific Railroad, between Wallula, State of Wash-

ington, and Portland, State of Oregon, was ever filed in this office, nor was any withdrawal of "indemnity lands" ever made on account of said railroad between said points.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

S. W. LAMOREUX,
Commissioner of the General Land Office.

(Endorsed:) Filed Aug. 12, 1893. R. H. Lamson, clerk.

F. W. C.

Exhibit 2 to amendment to bill.

W. J. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 15th, 1893.

I, S. W. Lamoreux, Commissioner of the General Land Office,
160 do hereby certify that the annexed copies, viz, (1) letter from the Secretary of the Interior, dated August 13th, 1870; (2) letter addressed to the register and receiver at Oregon City, Oregon, dated Sept. 20, 1870; (3) letter from the Secretary of the Interior, dated October 27th, 1870; (4) letter addressed to the register and receiver at Oregon City, Oregon, dated Feb'y 14, 1872, are true and literal exemplifications of the originals on file, or of record, in this office; further, that the withdrawals ordered by these letters are the only withdrawals ordered upon that portion of the line of the Northern Pacific Railroad extending from Portland, Oregon, to Wallula, Washington.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

S. W. LAMOREUX,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Augt. 13th, 1870.

SIR: I transmit herewith two maps showing the designated route of the Northern Pacific Railroad.

You will immediately direct the proper local land officers in the States of Wisconsin and Minnesota to withhold from sale, preemption, homestead, and other disposal the odd-numbered sections not sold, reserved, and to which prior rights have not attached, within twenty miles on each side of the route, and in like manner direct those officers in Washington

Territory to withhold such odd-numbered sections as lie south of
161 town of Steilacoom. The unsurveyed as well as surveyed lands will be included in the reservation, and you will direct the local officers to give notice accordingly; and as the township plats are received by them, they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

Very respectfully, your ob't servant,

J. D. Cox, *Secretary.*

Hon. Jos. S. WILSON,
Commr. of the Genl. Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Sept. 20th, 1870.

REGISTER & RECEIVER, *Oregon City, Oregon.*

GENTLEMEN: I transmit herewith a diagram showing the designated route of the Northern Pacific Railroad under act of July 2d, 1864, and, by direction of the Secretary of the Interior, you are directed to withhold from sale or location, preemption or homestead entry, all the odd-numbered sections of public lands falling within the limit of 20 miles, as designated on this map.

You will also increase in price to \$2.50 per acre the even-numbered sections within those limits, and dispose of them at that ratibility under the preemption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

162 This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

Jos. S. WILSON, *Commissioner.*

(Receipt acknowledged Oct. 15, 1870. "I," 21, 859.)

DEPARTMENT OF THE INTERIOR,
Washington D. C., Oct. 27th, 1870.

SIR: In my letters of the 13th and 16th August last, a withdrawal of lands for twenty miles on each side of the route of the Northern Pacific Railroad, in Washington Territory, was ordered to be made. That withdrawal will be increased to forty miles on each side of the route, and you will issue instructions accordingly.

Very respectfully, your obt servant,

J. D. Cox, *Secretary.*

Hon. Jos. S. WILSON,

Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

February 14, 1872.

REGISTER AND RECEIVER, *Oregon City, Oregon.*

GENTLEMEN: I transmit herewith a diagram showing the forty-mile limits of the Northern Pacific Railroad in your district, authorized by the act of Congress of July 2d, 1864, and, by direction of the Secretary of the Interior, you are requested to withhold from sale or location, preemption or homestead entry, all the odd-numbered sections of public lands falling within said limits.

163 You will also increase in price to \$2.50 per acre the even-numbered sections within these limits, and dispose of them at that ratibility, and under the preemption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increase price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

(Receipt ack. by register March 4, '72. Instructions rec'd on 2nd inst. at 4.30 o'clock. "I,"-86,622.)

(Endorsed:) No. 1982. N. P. R. R. Withdrawals & no def. loc. Filed Aug. 12, 1893. R. H. Lamson, clerk.

F. A. W.

Exhibit B.

A. M.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Jan. 12, 1893.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

WASHINGTON, D. C., 6 March, 1865.

Hon. J. P. USHER, *Secretary of the Interior.*

SIR: Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia River, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale in conformity to law.

I am, respectfully, your ob't serv't,

JOSIAH PERHAM,
Pres't N. P. R. R. Company.

(Endorsed:) Exhibit B. Letter of Perham. Mch. 6, 1865. Filed Feb. 3, 1893. R. H. Lamson, clerk.

165 F.

Exhibit D.

M. J. D.
W. C. E.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 9, 1892.

I, William M. Stone, Commissioner of the General Land Office, do hereby certify that the annexed copy, dated March 9, 1865, and signed

J. P. Usher, Secretary, is a true and literal exemplification from the original paper on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

W. M. STONE,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 9th, 1865.

(Address only the Commissioner of the General Land Office.)

SIR: Herewith I transmit a map upon which the "general line" of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market.

In view of the provisions of the 3d and 6th sections of the act of Congress, approved July 2, 1864 (Pamphlet Laws, 368, 369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the Territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad.

The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of Congress.

Very respectfully, your ob't servant,

J. P. USHER, *Secretary.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

(Endorsed:) G. 51416. Hon. Sec'y of Interior, March 9, 1865. Encloses a map upon which the "general line" of the Northern Pacific R. R. is delineated and directs the withdrawal of land from market. Exhibit D. Letter of Sec'y transmitting Perham map. Filed Feb. 3, 1893. R. H. Lamson, clerk.

F. A. W.

Exhibit E.

A. M.

P. M. S.

UNITED STATES OF AMERICA.

J. T. S.

(Vignette.)

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Dec. 9, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department and of the endorsement thereon.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

June 22nd, 1865.

HON. JAS. HARLAN,

Secretary of the Interior.

SIR: The late Secretary of the Interior, under date of the 9th March last, enclosed to this office a diagram showing the proposed route of the Northern Pacific Railroad, for which a grant of lands was made by the act approved July 2nd, 1864 (Stats. at Large, pamphlet laws 1864, p. 365). This diagram was filed in the Secretary's office, accompanied by a request for withdrawal of lands.

As no withdrawal was ordered by the late Secretary, no action was here taken upon the application.

Mr. Perham, the president of the railroad company, has called attention to the matter, and in submitting it I have the honor to state:

1st. That the present application deals with the railroad system of granting on the largest scale known to Congressional legislation.

It extends from Lake Superior to the Pacific Ocean, and, allowing for probable deflections, may be set down at 2,025 miles in length; taking in alternate sections, by estimate, 47,360,900 acres, in a belt of 40 miles wide through the Territories and twenty miles wide through the States, the general or conjectural course being indicated on the map herewith.

By the opinions of Attorney-General Cushing of 19th Decr., 1856, and 16th February, 1857 (Opinions of Attorneys-General, Vol. VIII, pp. 294 and 390, and the action of the Department), railroad grants take effect from the date when the survey of the route is actually made on the face of the earth.

The evidence required of the route under the established ruling of the Department is a connected map showing the exact location, the map indicating by flag-staffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section or smallest legal subdivisions cut by the route.

In the judgment of the Commissioner no withdrawal should be ordered until such map is filed in the General Land Office; and although in the Attorney-General's opinion (Mr. Cushing) the right takes hold from the date of the actual survey on the ground, yet upon that point this office, with deference to superior legal authority, holds that the grant does not become effective until the map is actually filed in the district land office, where citizens resort to ascertain what is public land and what is not, so that purchases can be made without danger of conflicting title. Yet, even admitting that the right in the railroad grant attaches from the date of such survey, we are without the means of ascertaining and determining the interest of rightful claimants until such map is filed. Now, in this view the Commissioner reports that no withdrawals should be ordered until the map of actual survey, authenticated as indicated, shall be filed in the district and General Land Office.

This may be done starting from the cul de sac of Lake Superior, the eastern initial point of the route, and stretching thence westwardly to the western boundary of Minnesota, the lines of the public surveys having been that far established.

2nd. The same course of proceeding to be had in regard to that portion of the road falling on the western or Pacific side within the range of existing public surveys; but

3d. Of course, no withdrawal can now be made on account of the road in the region of country extending across that part of the continent between the west boundary of Minnesota to the eastern surveys of Washington Territory, because over that territory the lines of the public surveys have not yet been established.

In this extended locality the withdrawal should only be ordered as the public surveys are advanced and survey of railroad established, in like manner as indicated under first head.

4th. A general withdrawal upon conjectural or uncertain bases might result in shutting out from settlement large bodies of land which an actual survey would show not within the grant, whilst lands would be omitted from the withdrawals which the survey might require to be included.

170 Then, it is not sound policy nor is there any warrant in our land legislation for doing any act the tendency of which would give preference to satisfy a grant on such a stupendous scale as this, whilst individual claims under our general system of land laws, homestead, preemption, and sales would be unaided by any such preliminary discriminating proceeding.

The result of a premature withdrawal on uncertain basis would be unjust to the pioneer settler, detrimental to the public interests in arresting the progress of settlement and disposal in that direction of the public domain, and to that extent checking the growth and prosperity of our frontier, and that, too, in the vicinity of a colonial dependence of a powerful nation; would be a prejudice to the interests of the railroad grant itself in excluding settlers and immigrants, whose labor and means would enhance the value of such lands as in the ordinary progressive operations of the land system would in due time fall to the grant.

The land system should be so administered that all the different acts of land legislation may be at the same time in full operation, giving precedence to no one law over another, unless where the term of the law indicate the public will to be otherwise, leaving corporate or other grantees and individuals respectively to have the benefit of their superior diligence in establishing and completing their several claims according to law.

For these considerations this office declines ordering a withdrawal until authenticated maps of the actual survey of the several portions of the route shall be successively filed from time to time to completion, showing the connections of said portions with the lines of the
171 public surveys, yet respectfully submits the foregoing considerations for such directions as the Secretary may be pleased to give in the premises for the government of this office.

With great respect, your obt. svt.,

JOS. S. WILSON, *Acting Commissioner.*

(Endorsement:) R ³⁷/₃₇ Northern Pacific. Dept. of Interior, Com. Gen. Land Office, June 22, 1865. Rec'd June 23, 1865. Submitting a diagram showing the proposed route of the Northern Pacific R. Road, etc.

* Sec'y sustains Commr's refusal.

* Thompson.

* Matter starred appears in lead pencil in original.

Department of the Interior. June 23, 1865. One 533. Exhibit E. Commr. to Secy., adverse to Perham map Filed Feb. 3, 1892. R. H. Lamson, clerk.

F. A. W.

Exhibit G.

A. M.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,

Washington, D. C., Jan. 12, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

172

WASHINGTON, D. C., *Feb. 17th. 1870.*

JAY COOKE, Esq.

MY DEAR SIR: I regret exceedingly that I am unable to remain over to see Secy. Cox with you to-morrow, but my engagements are imperative and I must leave for N. Y. in the morning. I hope you will not fail to impress upon the Sec'y the great importance of protecting the Northern Pacific R. R. Co. in the matter of their lands while the surveys are being made. It is well known to myself, and I have it upon the most undoubted authority, that organized bands of speculators are working in advance of our surveying parties, entering and taking up the most valuable of our lands, and thus depriving us of the only means left us for building our road.

To prevent this wholesale plunder, it has occurred to me that the Dept. of the Interior should protect us by withdrawing from public entry, except in cases of actual settlers under the homestead act, all the lands in Minnesota north of the parallel, say, of St. Cloud, about 47 or 46½, say, for a period of ninety days. This would enable us to complete our surveys and file our map in the Dept. It certainly is for the interest of the Govt. that this road should be built, and as Congress declines to give us a subsidy and we are left to our lands as our only resource, if we are not protected in these, especially as against avowed speculators, we have nothing left, and must necessarily abandon the enterprise entirely.

Whether any precedent exists for the method we propose, I do not know; but the manifest equity of our request I am sure none can deny.

Nor can any injury result to any legitimate interest. As to an honest and actual settler under the homestead we do not seek to interpose any obstacle, but we do think we have a right to ask protection as against parties whose only object is to plunder us.

I hope the Secretary may see the importance of our request and discover some method to give us relief.

I am, very sincerely, your friend,

J. GREGORY SMITH,
Presd. Nor. Pacific R. R. Co.

(Endorsed:) Exhibit G. Letter of J. Gregory Smith, Feby. 18/70, referring to speculators, etc. Filed Feb. 3, 1892. R. H. Lamson, clerk.

173

E. A. W.

Exhibit H.

A. M.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Jan. 12, 1893.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original of record in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

174

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 21st, 1870.

HENRY D. COOKE.

SIR: I have received your letter of the 18th inst., inclosing one from J. Gregory Smith, president Northern Pacific Railroad Company, stating that speculators are working in advance of said company's engineers and entering the most valuable of their lands, and asking if the Department cannot protect the company by withdrawing lands north of the parallel of Saint Cloud for ninety days.

In reply, I have to state that upon a map being filed showing the designated route of the Northern Pacific Railroad from the point on Lake Superior fixed upon as the "beginning of the road" to the western boundary of Minnesota an order will be issued to the Commissioner of the General Land Office to withdraw temporarily the odd sections not sold, reserved, &c., for twenty miles on each side thereof.

The company's surveys must have progressed so far that a route can be designated which will vary but little from what it will be when definitely located. Such a withdrawal will prevent the granted sections being entered and will accomplish the object Mr. Smith has in view. This is all the Department can do under the circumstances.

Very respectfully, your ob't servant,

J. D. Cox, *Secretary.*HENRY D. COOKE, Esq., *Washington, D. C.*

175 (Endorsed:) Exhibit H. Letter of Sec'y Cox, Feby. 21, '70.
Reply to H. D. Cooke. Filed Feb. 3, 1893. R. H. Lamson,
clerk.

F. A. W.

Exhibit J.

A. M.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Jan. 12, 1893.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

STATE OF NEW YORK,
County of New York, ss:

NEW YORK CITY, *July 26th, 1870.*

Edwin T. Johnson, of the city, county, and State of New York, deposes and says that he is the engineer in chief of the Northern Pacific Railroad Company, and that he has been such engineer in chief since June, A. D. 1866.

That during the period above named, surveys and explorations have been made at various places on the proposed route for said road, for determining its proper location, and that in connection with said surveys examinations have been made and information has been collected relative to other portions of said route sufficient to enable the said company to determine approximately and by reference to appropriate landmarks the proper position for the line of their said road on those portions, with a view to the withdrawal from market or from settlement of the lands granted to the said company on either side of their said road.

The portions of the line of the Northern Pacific Railroad, the proper location of which have thus been ascertained, extend, the first portion, from Lake Superior, in the State of Wisconsin, to the Columbia River, in the Territory of Washington—a distance, as estimated, of fifteen hundred and ten miles (1,510).

This portion is more particularly described as follows, viz:

Commencing in the State of Wisconsin, at the mouth of the Montreal River, the western boundary of upper Michigan; thence on a direct course south of west to the northwest corner of township forty-six (46), range four (4) west, in said Wisconsin, a distance of about twenty-five miles;

Thence in a direct course north of west to a point in the west line of township forty-eight (48), range sixteen (16) west, in Minnesota, one and one-half miles south of the northwest corner of said township, a distance of about sixty-eight (68) miles;

Thence on a direct and nearly west course through Carlton, Cass, Wadena, and Ottertail counties to the northwest corner of township one hundred and thirty-six (136), range thirty-eight (38) west, a distance of about one hundred and fifty miles.

Thence northwestwardly on a direct course through Ottertail, Becker, Clay, and Polk counties to a point on the east or right bank of the Red River, in the middle line of township one hundred and forty-two (142), range forty-eight (48) west, a distance of about sixty-nine miles.

Thence northwestwardly across the said river into the Territory of Dakota on a direct course to Fort Totten on Lake Miniwaken or Devils Lake in said Dakota, a distance of about one hundred and twenty miles.

Thence in a direction a little to the south of west on a direct line to the isolated butte or mound known as the Maison du Chien, in said Dakota, a distance of about ninety miles.

Thence southwestwardly on a direct course across the Missouri River to a point on the west or left bank of the Yellowstone River in Montana, situated fifty-two miles in a direct line southerly from Fort Union on the Missouri River, a distance of about one hundred and seventy-one miles.

Thence southwestwardly on a direct course to a point on the west or left bank of the Bighorn River, opposite to the mouth of Tullocks or Muddy Creek, about seven miles from the Yellowstone River, an estimated distance of one hundred and sixty-six miles.

Thence on a direct course southwestwardly to the mouth of Clarks Fork, a branch of the Yellowstone River in said Montana, a distance of about seventy-four miles.

178 Thence following up the valley of the Yellowstone River, on its south side, and parallel nearly with its general course, to a point on its east or right bank, opposite the mouth of Shields or Twenty-five Mile River, a distance of about ninety-five miles.

Thence up the Yellowstone River on its right or east bank, crossing it and entering a valley leading from it to the pass known as Bozemens Pass, on nearly a direct course to Fort Ellis, a distance of about twenty-two miles.

Thence on a direct course westwardly across the Gallatin and Madison rivers to the mouth of Boulder Creek, of the Jefferson branch of the Missouri River, a distance of about forty miles. Thence following up the valley of the *valley of the* Jefferson River southwestwardly and parallel nearly with the general course of said river, to the mouth of the Wisdom River, a distance, as estimated, of sixty miles. Thence due west across the main divide of the Missouri and Columbia waters on a direct course to the mouth of the Beaver Creek, a branch of the Salmon River, near the great bend of the latter in the Territory of Idaho, a distance, as estimated, of ninety miles. Thence following down the Salmon River in said Idaho, keeping near to it to a point on its north bank twenty miles from its mouth, a distance, as estimated, at one hundred and thirty miles. Thence in a northwestwardly direction on a direct course to a point on the east or right bank of the Lewis and Saptin River, ten miles north of the point where the boundary line of Washington Territory and Oregon meets that river, a distance, as estimated, of fifty miles.

179 Thence on a direct course a little to the south of west, crossing the Lewis or Saptin River into Washington Territory, to a point on the right or northwesterly bank of the Columbia River, opposite to the mouth of the Walla Walla River, a distance, as estimated, of ninety miles.

Making altogether on this portion a distance of fifteen hundred and ten (*twenty) miles, more or less, from the point of commencement on Lake Superior, in Wisconsin, to the Columbia River, at the mouth of the Walla Walla River, in Washington Territory.

Another portion of the line of the Northern Pacific Railroad, the proper location of which has been ascertained as above, is situated in Washington Territory, and extends from the international boundary of forty-nine degrees of north latitude southerly along the easterly side of Puget Sound, or of the chain of inland tide waters connected with the straight of Juan de Fuca to their southern extremity; thence southerly to the Columbia

* Correction in lead pencil in original.

River and along the eastern and northerly or right bank of that river to a point opposite to the mouth of the Walla Walla River, in said Territory.

This portion is more particularly described as follows, viz:

Commencing at the point where said international boundary of forty-nine degrees of north latitude first meets in its course west the tide waters of the Pacific Ocean.

180 Thence southeastwardly by the most direct course to the town of Whatcom, on Bellingham Bay, in said Territory, a distance of about twenty miles.

Thence southeastwardly on a direct course to the middle point of township number thirty-seven (37), range three (3) east, of the Willamette meridian, a distance of about six miles.

Thence southeastwardly on a direct course to the middle point of township No. (30) thirty, range five (5) east, of the Willamette meridian, a distance of about forty-four miles.

Thence southwestwardly on a direct course to the middle point of township twenty-seven (27), range four (4) east, of the Willamette meridian, a distance of about twenty miles.

Thence due south on a direct course to the middle point of township twenty-one (21), range four (4) east, of the Willamette meridian, a distance of thirty-six miles.

Thence southwestwardly on a direct course to the southwest corner of township seventeen (17), range two (2), west of the Willamette meridian, a distance of about forty-two miles.

Thence on a direct course a little east of south to the middle point of the west line of township seven (7), range one (1), west of the Willamette meridian, on or near the east or right bank of the Columbia River, a distance of about fifty-two miles.

Thence following the east or right bank of said river, or near the line of high-water mark of the same, southerly to the sight of Fort Vancouver, and thence across said river to Portland, Oregon, and back to Fort Vancouver, a distance of about thirty-three miles to Portland.

181 Thence from Fort Vancouver following the right or northerly bank of the said Columbia River, on or near the line of high-water mark of the same, eastwardly through the Cascade range of highlands to a point opposite the mouth of the Walla Walla River, a distance of one hundred and ninety miles, more or less; making an estimated distance altogether on this portion of the route of four hundred and forty-three miles, and for the aggregate of the two portions, as described above, a distance of nineteen hundred and fifty-(^{sixty})three miles, more or less.

These two portions of the Northern Pacific Railroad, above described, are fully exhibited on the two maps, respectively, hereto appended, and signed by the undersigned of even date with this certificate.

EDWIN F. JOHNSON,

Eng. in Chief, N. Pacific R. R. Comp'y.

Sworn and subscribed to this twenty-sixth day of July, A. D. 1870, before me,

[SEAL.]

W. N. GODDARD,

Notary Public, Co. of N. Y.

* Correction in lead pencil in original.

It is hereby certified that in pursuance of the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," and the several acts amendatory thereto, certain portions of the line or route for said road were so far definitely fixed by resolution of the board of directors of said
 182 company on the eighth day of July, A. D. 1870, as to make it the duty of the president of the said company to request the honorable the Secretary of the Interior to withdraw or withhold from sale and settlement the public lands to which said company are entitled on either side of the lands of their road so described as aforesaid in the certificate of their engineer in chief.

They therefore respectfully ask that their interests may be protected so far as they can be by a withdrawal of lands, as above set forth.

Such protection, it is believed, is in strict accordance with the intention of Congress in granting lands to the company for the construction of their road, and will save the company from a serious loss or diminution in the value of the grant consequent upon the delay necessary in making the surveys for filing a location in the usual form.

In testimony whereof the Northern Pacific Railroad Company has caused the same to be signed by its president and has attached hereunto its corporate seal at the city of New York this twenty-sixth day of July, A. D. 1870.

[SEAL.]

J. GREGORY SMITH,
President Nor. Pacific R. R. Co.

SAM'L WILKESON, *Secretary.*

(Endorsed:) Exhibit J. Certificate of officers of N. P. R. R. Co., with map of general route. Ex. A. Filed Feb. 3, 1893. R. H. Lamson, clerk.

183 F. A. W.

Exhibit K.

A. M.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Jan. 12, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original of record in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., August 13th, 1870.

J. G. SMITH.

SIR: I received from Edwin F. Johnson, esq., engineer in chief, on the 4th instant, two maps showing the general route of the Northern

Pacific Railroad, commencing at the mouth of the Montreal River, in Wisconsin, and terminating at the international boundary line on Simiah-moo Bay, in Washington Territory.

The line in said Territory skirts along the entire eastern shore of the waters of Puget Sound. The line as thus run passes many places where deep water is found, and no necessity for terminating it on the boundary line can be perceived. The grant is "to some point on

184 Puget Sound," and does not, as I conceive, recognize any right in the company to cover and control all the waters connected therewith. I have therefore directed the Commissioner to withdraw the odd-numbered sections within 20 miles on each side of the route in Wisconsin and Minnesota, and in Washington Territory only to withdraw such sections south of the town of Steilacoom.

It is noticed that the route passes through several diminished permanent Indian reservations. I do not recognize the right of the company to locate or construct their road through such reservations where the road can as well be constructed outside of them. They are intended for the homes of the Indians, and can only be encroached upon in case of absolute necessity from the topographical nature of the country. Upon a proper showing of such a state of fact, the Department will authorize the company to negotiate with the Indians for a right of way.

Very respectfully, your ob't servant,

J. D. Cox, *Secretary.*

J. GREGORY SMITH, Esq.,

Pres't. Northern Pac. R. R. Co., 120 Broadway, New York.

(Endorsed :) Exhibit K. Letter of Secy. to J. G. Smith, Aug. 13, '70. Withdrawal under two maps N. P., general route. Exhibit A. Filed Feb. 3, 1893. R. H. Lamson, clerk.

185 *Exhibit M—Patent No. 1.*

T. C.
W. C. E.

(Copy.)

OREGON AND CALIFORNIA RAILROAD LANDS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., November 23, 1892.

I, W. M. Stone, Commissioner of the General Land Office, do hereby certify that the annexed copy of patent number one of lands issued May 9, 1871, to the Oregon and California Railroad Company, under the act of July 25, 1866, covering 32,517.21 acres, is a true and literal exemplification of the original as recorded in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

W. M. STONE,

Commissioner of General Land Office.

THE UNITED STATES OF AMERICA.

B. M. P.
M. B. H.

To all to whom these presents shall come, greeting :

Whereas, by the acts of Congress approved July 25th, 1866, and June 25th, 1868, "to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,"

authority is given to the Oregon and California Railroad Company, 186 of Oregon, a corporation existing under the laws of the State, "to construct a railroad and telegraph line," under certain conditions and stipulations, as expressed in said acts; and provision is made for granting to the said company "every alternate section of public land designated by odd numbers to the amount of ten alternate sections per mile on each side of the said railroad on the line thereof, and within the limits of twenty miles on each side of said road," not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed.

And whereas an official statement bearing date January 31st, 1870, from the Secretary of the Interior, has been filed in the General Land Office, showing that the commissioners appointed by the President under provisions of the fourth section of the aforesaid act have reported to him that the first section of twenty miles of the road and telegraph line, "commencing at East Portland, in the county of Multnomah, Oregon, and terminating near Parrotts Creek, on the right or east bank of the Willamette River, in the county of Clackamas, in said State," has been constructed and fully completed and equipped in the manner prescribed by the acts relative thereto, and the president of the Oregon and California Railroad Company, of Oregon, has applied for a conveyance of the title to the lands granted to said company by the acts of Congress of July 25, 1866, and June 25, 1868.

And whereas certain tracts have been selected under the acts aforesaid by J. R. Moores, the agent of the Oregon and California Rail- 187 way Company, as shown by his original list of selections, dated

July 12th, 1870, and certified under date of July 28, 1870, by the register and receiver at Oregon City, Oregon, the said tracts being described as follows, to wit :

SOUTH OF BASE LINE AND EAST OF WILLAMETTE MERIDIAN.

Township two, range one.

Lot number two of section three, containing sixteen acres and seventy-nine hundredths of an acre.

Lots numbered one and eight of section nine, containing twenty-one acres and ninety-two hundredths of an acre.

Lots numbered one, two, and four of section twenty-nine, containing ninety-eight acres and eighty-six hundredths of an acre.

Township three, range one.

East half of southeast quarter of section five, containing eighty acres.

Lots numbered one, seven, eight, and nine of section fifteen, containing ninety-six acres and forty-five hundredths of an acre.

Southwest quarter of northeast quarter of section seventeen, containing forty acres.

Township one, range two.

Lot number two of section eleven, containing thirty-seven acres and sixty-six hundredths of an acre. Northeast quarter of northeast quarter of section fifteen, containing forty acres. Lots numbered one, two, three, four, and south half of section twenty-three, containing three
188 hundred and seventy-nine acres and sixty-nine hundredths of an acre. Southeast quarter of southeast quarter and west half of southwest quarter of section twenty-seven, containing one hundred and twenty acres. Southeast quarter of northeast quarter and lots numbered one, two, and four of section twenty-nine, containing one hundred and thirty-six acres and thirty hundredths of an acre. Lots numbered three and four of section thirty-five, containing five acres and sixty hundredths of an acre.

Township two, range two.

Lots numbered four and seven of section thirteen, containing thirteen acres and sixteen hundredths of an acre. Southwest quarter of northwest quarter and southwest quarter of section twenty-three, containing two hundred acres. West half of northeast quarter, northwest quarter, northwest quarter of southeast quarter, and north half of southwest quarter of section thirty-five, containing three hundred and sixty acres.

Township three, range two.

West half of northwest quarter, west half of southwest quarter, and east half of southeast quarter of section one, containing two hundred and thirty-eight acres and fifty-two hundredths of an acre. Lots numbered one and two of section three, containing fourteen acres and fifty-five hundredths of an acre. East half of section, southeast quarter of northwest quarter, east half of southwest quarter, southwest quarter of southwest quarter, and lots numbered one, two, and three of
189 section eleven, containing five hundred and sixty-eight acres and seven hundredths of an acre. East half of section thirteen, containing three hundred and twenty acres. South half of southeast quarter and lots numbered one, two, three, four, and five of section seventeen, containing one hundred and sixty-eight acres and eight hundredths of an acre.

Township one, range three.

Southwest quarter of northeast quarter, northwest quarter, and lot numbered two of section five, containing two hundred and five acres and ninety-two hundredths of an acre. North half of northeast quarter of section seven, containing eighty acres. West half of northwest quarter of section fifteen, containing eighty acres. Lots numbered three, four, and five of section seventeen, containing twenty-one acres and forty-five hundredths of an acre. Lots numbered seven and eight of section nineteen, containing eight acres and fourteen hundredths of an acre. East

half of northeast quarter, east half of southeast quarter, southwest quarter of southwest quarter, and lot number two of section twenty-one, containing two hundred and twenty-two acres and forty hundredths of an acre. South half of southwest quarter of section twenty-three, containing eighty acres. East half of southeast quarter, east half of northwest quarter, southwest quarter of northwest quarter, southwest quarter, and lot number one of section twenty-five, containing three hundred and eighty-four acres and seventy-six hundredths of an acre. Northwest quarter of section twenty-seven, containing one hundred and sixty acres. Northeast quarter, north half of southeast quarter, and lots numbered one, two, three, and four of section twenty-nine, containing three hundred and eleven acres and sixty-nine hundredths of an acre. Northwest quarter of section thirty-one, containing one hundred and seventy-two acres and ninety hundredths of an acre. Northeast quarter of northeast quarter, west half of northeast quarter, and northwest quarter of section thirty-three, containing two hundred and eighty acres. Northeast quarter, east half of northwest quarter, north half of southeast quarter, and north half of southwest quarter of section thirty-five, containing four hundred acres.

Township two, range three.

Northeast quarter and east half of southeast quarter of section one, containing two hundred and forty acres and fifty hundredths of an acre. East half of northeast quarter, southeast quarter, and east half of southwest quarter of section eleven, containing three hundred and twenty acres. North half of southeast quarter and northeast quarter of southwest quarter of section thirteen, containing one hundred and twenty acres. Southeast quarter of northeast quarter and northeast quarter of southeast quarter of section seventeen, containing eighty acres. Lot number two of section twenty-one, containing forty-seven acres and sixty hundredths of an acre. Lots numbered three, four, five, six, and eight of section twenty-three, containing twenty-six acres and twenty-eight hundredths of an acre. Lot number five of section twenty-five, containing thirty-one acres and ninety-eight hundredths of an acre. 191 Lot number four of section twenty-nine, containing twenty-three acres and ten hundredths of an acre. West half of northwest quarter and lots numbered three, four, five, six, and seven of section thirty-one, containing two hundred and twenty-seven acres and fifty-eight hundredths of an acre. Lots numbered three, four, five, and south half of southeast quarter of section thirty-five, containing one hundred and forty-four acres and five hundredths of an acre.

Township three, range three.

Lots numbered three, four, five, six, seven, eight, and eleven of section one, containing one hundred and sixty-five acres and fifty-one hundredths of an acre. Lots numbered one, two, and three of section three, containing thirty-two acres and eighty-eight hundredths of an acre. North half of northeast quarter, southeast quarter of southwest quarter, and lots numbered one, two, and three of section five, containing one

hundred and forty-seven acres and twenty-eight hundredths of an acre. West half of northeast quarter, west half of southeast quarter, southwest quarter, and lots numbered one, two, three, and four of section seven, containing four hundred and two acres and two hundredths of an acre. Northwest quarter, southeast quarter, and lots numbered one, two, and three of section nine, containing three hundred and ninety-nine acres and sixty-three hundredths of an acre. Lots numbered two, three, five, seven, ten, and northwest quarter of southeast quarter of section thirteen, containing two hundred and thirty-three acres and ninety-four hundredths of an acre. Lots numbered one, two, three, six, seven, 192 and eight of section fifteen, containing seventy-five acres and twenty-seven hundredths of an acre. Lot number one and southwest quarter of northwest quarter of section seventeen, containing seventy-eight acres and thirty-six hundredths of an acre.

Township one, range four.

Southwest fractional quarter of section seven, containing one hundred and sixty acres and twenty hundredths of an acre. Northeast quarter of section seventeen, containing one hundred and sixty acres. Southwest quarter of section twenty-three, containing one hundred and sixty acres. All of section twenty-five, containing six hundred and forty acres.

Township two, range four.

Northeast quarter and west half of section one, containing four hundred and seventy-six acres and ninety-eight hundredths of an acre. East half of northeast quarter and southeast quarter of section seven, containing two hundred and forty acres. All of section nine, containing six hundred and forty acres. All of section eleven, containing six hundred and forty acres. North half of northeast quarter, north half of northwest quarter, southwest quarter of northwest quarter, northwest quarter of southwest quarter, and southeast quarter of section thirteen, containing four hundred acres. All of section fifteen, containing six hundred and forty acres. North half of section seventeen, containing three hundred and twenty acres. North half of northeast quarter, southeast quarter of northeast quarter, and lots numbered one, two, and four of section nineteen, containing one hundred and eighty-five acres and three hundredths of an acre. Northeast quarter of northeast quarter and southwest quarter of section twenty-one, containing two hundred acres. North half of northeast quarter, south half of southeast quarter, northeast quarter of northwest quarter, west half of northwest quarter, and south half of southwest quarter of section twenty-three, containing three hundred and sixty acres. All of section twenty-five, containing six hundred and forty acres. South half of northeast quarter, south half of northwest quarter, and south half of section twenty-seven, containing four hundred and eighty acres. East half of northeast quarter, southwest quarter of northeast quarter, and southeast quarter of southeast quarter of section thirty-three, containing one hundred and sixty acres. All of section thirty-five, containing six hundred and forty acres.

Township three, range four.

All of section one, containing six hundred and forty-three acres, and sixty-eight hundredths of an acre. Southeast quarter of southwest quarter of section three, containing forty acres. Lots numbered two and three of section five, containing forty-one acres and fourteen hundredths of an acre. Lots numbered one and two of section nine, containing eighty-two acres and twenty hundredths of an acre. All of section eleven, containing six hundred and forty acres. All of section thirteen, containing six hundred and forty acres.

194 Township two, range five.

Southwest quarter of northeast quarter, south half of northwest quarter, and lots numbered one, two, three, and five of section seven, containing two hundred and forty acres, and eighty-seven hundredths of an acre. North half of section nine, containing three hundred and twenty acres. Northeast quarter, northwest quarter of northwest quarter, and south half of southwest quarter of section seventeen, containing two hundred and eighty acres. Northeast quarter, west half of southeast quarter, and west half of section nineteen, containing five hundred and forty-eight acres and six hundredths of an acre. Southwest quarter of northwest quarter and south half of section twenty-one, containing three hundred and sixty acres. North half of section, southwest quarter and east half of southwest quarter of section twenty-nine, containing five hundred and sixty acres. All of section thirty-one, containing six hundred and twenty-six acres and eighty-two hundredths of an acre. All of section thirty-three, containing six hundred and forty acres.

Township three, range five.

Southwest fractional quarter of section seven, containing one hundred and fifty-seven acres. All of section seventeen, containing six hundred and forty acres.

SOUTH OF BASE LINE AND WEST OF WILLAMETTE MERIDIAN.

Township one, range one.

195 Lot number five of section five, containing twenty-two acres and fifty hundredths of an acre. Lot number four and southwest quarter of southwest quarter of section nineteen, containing sixty-two acres and twenty-eight hundredths of an acre. East half of section, and northwest fractional quarter of section thirty-one, containing four hundred and eighty-six acres and eighty hundredths of an acre. Lot number four of section thirty-five, containing eight acres and ninety-six hundredths of an acre.

Township two, range one.

Lot numbered one and two of section three, containing forty acres. South half of northeast quarter and southeast quarter of section five, containing two hundred and forty acres. Northeast quarter of northeast

quarter, northwest quarter of southeast quarter, and northeast quarter of southwest quarter of section seven, containing one hundred and twenty acres. North half of southeast quarter of section thirteen, containing eighty acres. Southwest quarter of northwest quarter, south half of southeast quarter, and southeast quarter of southwest quarter of section twenty-five, containing one hundred and sixty acres. Southwest quarter of southwest quarter of section twenty-seven, containing forty acres. Northeast quarter, northeast quarter of northwest quarter, southwest quarter of northwest quarter, and east half of southeast quarter of section thirty-three, containing three hundred and twenty acres.

Township three, range one.

Northwest quarter of northwest quarter, southeast quarter of southwest quarter, and lot one of section one, containing eighty-eight acres and fourteen hundredths of an acre. Northeast fractional quarter of northwest quarter of section three, containing forty acres and fifty-nine hundredths of an acre. North fractional half of northeast quarter and north fractional half of northwest quarter of section seven, containing one hundred and sixty-seven acres and eighteen hundredths of an acre. Northeast quarter of southwest quarter of section seventeen, containing forty acres.

Township one, range two.

Lots numbered six and eight of section seventeen, containing thirty-eight acres and fifty hundredths of an acre. East half of section twenty-five, containing three hundred and twenty acres. Lots numbered three, four, and northwest quarter of northeast quarter of section twenty-seven, containing one hundred and seven acres and seven hundredths of an acre. Lots numbered one, five, and eight of section thirty-one, containing fifty-two acres and thirty-one hundredths of an acre. Lots numbered three and four of section thirty-three, containing fifty-five acres and sixty-six hundredths of an acre.

Township two, range two.

Lot number four, and northeast quarter of southwest quarter of section one, containing fifty acres and seventy hundredths of an acre. Lots numbered one, two, three, north half of northwest quarter, and southwest quarter of northwest quarter of section five, containing one hundred and ninety-one acres and forty-five hundredths of an acre. South half of northwest quarter, south half of southeast quarter, and east half of southwest quarter of section seven, containing two hundred and forty-one acres and ninety-six hundredths of an acre. Lots numbered three and four of section nine, containing nineteen acres and sixty hundredths of an acre. Lot number one of section eleven, containing ten acres and sixty-eight hundredths of an acre. Lots numbered one, two, and three of section thirteen, containing twenty-five acres and fifty hundredths of an acre. North half of section, northeast quarter of southeast quarter, west of southeast quarter, and southwest quarter of section seventeen, containing six hundred acres. East half of section nineteen, containing three hundred and twenty acres. East half of northeast quarter

and south half of section twenty-one, containing four hundred acres. East half of section, east half of northwest quarter, east half of southwest quarter, and lot number one of section twenty-three, containing five hundred and seven acres and eighty-two hundredths of an acre. Northwest quarter and northwest quarter of southwest quarter of section twenty-five, containing two hundred acres. East half of northwest quarter and east half of southeast quarter of section twenty-seven, containing one hundred and sixty acres. West half of northwest quarter, west half of southwest quarter, and southeast quarter of southeast quarter of section twenty-nine, containing two hundred acres. North half of northeast quarter and southeast quarter of southwest quarter of section thirty-one, containing one hundred and twenty acres. West half of northeast quarter, 198 northwest quarter, west half of southeast quarter, and north half of southwest quarter of section thirty-three, containing four hundred acres. Northeast quarter, northwest quarter of northwest quarter, and southwest quarter of southwest quarter of section thirty-five, containing two hundred and forty acres.

Township three, range two.

Lots numbered one and two of section three, containing forty acres. Southwest quarter of northeast quarter of section five, containing forty acres. Northeast quarter of northeast quarter and lots numbered one, two, and three of section nine, containing seventy-two acres and fifteen hundredths of an acre. West half of northwest quarter and southeast quarter of section thirteen, containing two hundred and forty acres.

Township one, range three.

West half of section, and north half of southeast quarter of section fifteen, containing four hundred acres. Lots numbered three, four, and southwest quarter of southeast quarter of section twenty-three, containing forty-four acres. Lots numbered one, three, four, five, and south half of northwest quarter of section twenty-five, containing one hundred and forty-two acres and forty-four hundredths of an acre. Northwest quarter and northeast quarter of southwest quarter of section twenty-seven, containing two hundred acres. All of section thirty-five, containing six hundred and forty acres.

Township two, range three.

East half of southeast quarter and west half of southwest quarter of section one, containing one hundred and sixty acres. East 199 half of northeast quarter, east half of southeast quarter, northwest quarter of northwest quarter, and lots numbered one, two, three, and four of section three, containing two hundred and seventy-three acres and forty hundredths of an acre. Northeast quarter of northeast quarter and lot number two of section five, containing forty-six acres and twenty hundredths of an acre. North half of section, east half of southeast quarter, northwest quarter of southeast quarter, and lots numbered one, two, three, and four of section nine, containing five hundred and seventy-nine

acres and seventy-one hundredths of an acre. Northwest quarter of northwest quarter, south half of northeast quarter, south half of northwest quarter, and south half of section eleven, containing five hundred and twenty acres. West half of southwest quarter of section thirteen, containing eighty acres. Lots numbered one, two, three, four, and five of section twenty-one, containing one hundred and twenty-two acres and thirty-six hundredths of an acre. North half of section twenty-three, containing three hundred and twenty acres. Northeast quarter of section twenty-five, containing one hundred and sixty acres. Lots numbered two, three, and four of section twenty-nine, containing ninety-one acres and ninety-two hundredths of an acre. Lot number one of section thirty-three, containing thirteen acres and eighteen hundredths of an acre. South half of northeast quarter, north half of southeast quarter, southeast quarter of southeast quarter, northeast quarter of southeast quarter, and lots numbered two, three, four, five, seven, and eight of section 200 thirty-five, containing three hundred and twenty-nine acres and fifty-hundredths of an acre.

Township three, range three.

Lots numbered one and two of section one, containing fifty-eight acres and eighty-eight hundredths of an acre. Lot number one of section seven, containing four acres and ninety hundredths of an acre.

The said tracts as described in the foregoing pages from number one to six, inclusive, containing in the aggregate (32,517.21) thirty-two thousand five hundred and seventeen acres and twenty-one hundredths of an acre.

Now know ye, that the United States of America, in consideration of the premises and pursuant to the said acts of Congress have given and granted and by these presents do give and grant unto the said Oregon and California Railroad Company, of Oregon, and to its assigns, the tracts of land selected as aforesaid and described in the foregoing; yet excluding and excepting from the transfer by these presents "all mineral lands," should any such be found to exist in the tracts described in the foregoing; but this exception and exclusion, according to the terms of the statute, "shall not be construed to include coal and iron lands," to have and to hold the said tracts with the appurtenances unto the said Oregon and California Railroad Company, of Oregon, and to its assigns forever, with the exclusion and exception as aforesaid.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

201 Given under my hand at the city of Washington this ninth day of May, in the year of our Lord one thousand eight hundred and seventy-one and of the Independence of the United States the ninety-fifth.

By the President:

[SEAL.]

U. S. GRANT.

By I. PARISH, *Secretary*.

I. N. GRANGER,

Recorder of the General Land Office.

(Endorsed:) Filed Feb. 3, 1893. R. H. Lamson, clerk.

*Exhibit M.—Patent No. 2.*S. S. M.
W. C. E.

(Copy. Comprising patent 1 and 2.)

PATENT NO. 2. OREGON AND CALIFORNIA RAILROAD LANDS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Nov. 23, 1892.

I, W. M. Stone, Commissioner of the General Land Office, do hereby certify that the annexed copy of patent No. 2, issued to the Oregon and California Railroad Company July 12, 1872, and covering 120,237.46 acres of land, is a true and literal exemplification from the record thereof in this office.

In testimony whereof I have hereunto subscribed my name
202 and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[SEAL.]

W. M. STONE,
Commissioner of General Land Office.

(Compared by B. M. P.—J. M. W.)

UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting :

Whereas by the acts of Congress approved July 25th, 1866, and June 25th, 1868, "to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," authority is given to the Oregon and California Railroad Company, of Oregon, a corporation existing under the laws of the State, "to construct a railroad and telegraph line" under certain conditions and stipulations, as expressed in said acts; and provision is made for granting to the said company every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile on each side of the said railroad on the line thereof, and within the limits of twenty miles on each side of said road, "not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed."

And whereas it is further enacted in said section that "when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted,
203 or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections."

And whereas an official statement bearing date of January 31st, 1870, from the Secretary of the Interior has been filed in the General Land Office showing that the commissioners appointed by the President under provisions of the fourth section of the aforesaid act have reported to him

that the first section of twenty miles of the road and telegraph line commencing at East Portland, in the county of Multnomah, Oregon, and terminating near Parrotts Creek, on the right or east bank of the Willamette River, in the county of Clackamas, in said State, "has been constructed and fully completed and equipped in the manner prescribed by the acts relative thereto; and the president of the Oregon and California Railroad Company, of Oregon, has applied for a conveyance of the title to the lands granted to said company by the acts of Congress of July 25th, 1866, and June 25th, 1868.

And whereas certain tracts have been selected under the acts aforesaid by J. R. Moores, the agent of the Oregon and California Railroad Company, as shown by his original lists of selections, dated February 20th, 1871, and certified under date of April 29th, 1871, by the register and receiver at Oregon City, Oregon, the said tracts being described as follows, to wit:

204 SOUTH OF BASE LINE AND EAST OF WILLAMETTE PRINCIPAL MERIDIAN.

Township three, range one.

Lot number one of section twenty-five, containing thirty acres and twenty-five hundredths of an acre. Lot numbered one, two, three, and four of section thirty-five, containing thirty-five acres and forty-two hundredths of an acre.

Township four, range one.

Southeast quarter of section one, containing one hundred and sixty acres. Northeast quarter of southwest quarter of section eleven, containing forty acres. West half of northeast quarter of section thirteen, containing eighty acres. North half of southeast quarter of section twenty-three, containing eighty acres. Lot number one of section twenty-seven, containing fifteen acres and thirty-six hundredths of an acre.

Township five, range one.

Lots numbered one, two, and three of section seven, containing eleven acres and fifty hundredths of an acre.

Township six, range one.

Northeast quarter of section one, containing one hundred and fifty-nine acres and fifty-two hundredths of an acre. Lots numbered eight and nine of section eleven, containing sixty-one acres and ninety-one hundredths of an acre. West half of section thirteen, containing three

hundred and twenty acres. East half of the northeast quarter and lots numbered one and two of section twenty-three, containing one hundred and fifty-eight acres and eighty hundredths of an acre. East half of section and southwest quarter and east half of northwest quarter of section twenty-five, containing five hundred and sixty acres. All of section thirty-five, containing six hundred and forty acres.

Township seven, range one.

Lots numbered one, two, four, five, and six of section seven, containing ninety-seven acres and forty-seven hundredths of an acre. East half of northwest quarter of section nine, containing eighty acres. Lots numbered one and two of section seventeen, containing forty-six acres and forty-three hundredths of an acre.

Township eight, range one.

South half of northwest quarter of section thirty-three, containing eighty acres.

Township nine, range one.

Lots numbered one, two, three, and four of section eleven, containing one hundred and fifty-one acres and twenty-eight hundredths of an acre. Southwest quarter of southeast quarter, southeast quarter of southwest quarter, and lots numbered five, six, seven, and eight of section thirteen, containing two hundred and thirty acres and eighty-two hundredths of an acre. Lots numbered four and five of section fifteen, containing eighty-four acres and seventy-five hundredths of an acre. South half of section, southwest quarter of northeast quarter, southeast quarter of northwest quarter, and lots numbered five, six, seven, and eight
206 of section twenty-one, containing five hundred and thirty-five acres and thirty-eight hundredths of an acre.

Southwest quarter, south half of southeast quarter, north half of northeast quarter, southeast quarter of northwest quarter, and lots numbered one, two, and three of section twenty-three, containing four hundred and sixty-two acres and thirty-nine hundredths of an acre. Northeast quarter of section twenty-five, containing one hundred and sixty acres. Lot number one of section thirty-one, containing twenty-three acres and thirty-five hundredths of an acre. Northeast quarter, north half of northwest quarter, and lots numbered four and five of section thirty-five, containing two hundred and ninety-six acres and fourteen hundredths of an acre.

Township ten, range one.

East half of section, northeast quarter of northwest quarter, and lots numbered one, two, three, four, five, and six of section one, containing four hundred and fifty-seven acres and eighty-nine hundredths of an acre. Lots numbered one, two, three, four, five, and six of section three, containing fifty-two acres and ninety-nine hundredths of an acre. Lots numbered one, two, and three of section five, containing thirty-nine acres and forty hundredths of an acre. East half and southwest quarter of section eleven, containing four hundred and eighty acres. All of section thirteen, containing six hundred and forty acres. Southeast quarter, south half of southwest quarter of section fifteen, containing two hundred and forty acres. South half of northwest quarter, north-
207 west quarter of northwest quarter, and south half of section seventeen, containing four hundred and forty acres. Northwest quarter, east half of southwest quarter, northwest quarter of southwest

quarter, and east half of section nineteen, containing five hundred and ninety-seven acres and sixteen hundredths of an acre. East half of northeast quarter of section twenty-one, containing eighty acres. Northeast quarter, north half of northwest quarter, and lots numbered one and two of section thirty-one, containing three hundred and eleven acres and fifty-two hundredths of an acre.

Township eleven, range one.

Northwest quarter, east half of southwest quarter, and east half of section five, containing five hundred and fifty-eight acres and fourteen hundredths of an acre. All of section seventeen, containing six hundred and forty acres. Southwest quarter of northeast quarter, south half of northwest quarter, north half of southwest quarter, and lots numbered one, two, three, four, five, six, seven, and eight, of section nineteen, containing three hundred and sixty-eight acres and thirty-seven hundredths of an acre. North half of southeast quarter, southeast quarter of southeast quarter, and north half of section twenty-one, containing four hundred and forty acres. South half of southeast quarter, south half of southwest quarter, northwest quarter of southeast quarter, and southeast quarter of northwest quarter of section twenty-nine, containing two hundred and forty acres. North half of northeast quarter, north half of northwest quarter, south half of southeast quarter, and lots
208 numbered one, two, three, four, and five of section thirty-one, containing three hundred and thirty-five acres.

Township three, range two.

Southeast quarter of southeast quarter, and west half of southeast quarter of section twenty-five, containing one hundred and twenty acres. Northwest quarter and north half of northeast quarter of section twenty-nine, containing two hundred and forty acres. Southwest quarter of northwest quarter, southwest quarter of southeast quarter, southeast quarter of southwest quarter, west half of southwest quarter, and southeast quarter of northeast quarter of section thirty-one, containing two hundred and thirty-eight acres and twenty-three hundredths of an acre.

Township four, range two.

South half and northwest quarter of section one, containing four hundred and eighty acres and twenty-four hundredths of an acre. East half of southwest quarter and southeast quarter of northwest quarter of section three, containing one hundred and twenty acres. West half of northwest quarter and west half of southwest quarter of section five, containing one hundred and fifty-nine acres and sixty-seven hundredths of an acre. Northeast quarter of section seven, containing one hundred and sixty acres. All of section eleven, containing six hundred and forty acres. Northwest quarter, west half of northeast quarter, and north half of southeast quarter of section thirteen, containing three hundred and twenty acres. East half and southwest quarter and east half of
209 northwest quarter of section fifteen, containing five hundred and sixty acres. Lot number two of section nineteen, containing

thirty-seven acres and fifty-six hundredths of an acre. North half of northeast quarter and east half of northwest quarter of section twenty-one, containing one hundred and sixty acres. East half of section and northwest quarter and north half of southwest quarter of section twenty-three, containing five hundred and sixty acres. East half of northeast quarter and south half of section twenty-five, containing four hundred acres. Lots numbered one and two of section thirty-five, containing thirteen acres and sixty-three hundredths of an acre.

Township five, range two.

Lots numbered three, four, and five, of section one, containing eighty-six acres and seventy-seven hundredths of an acre. Lots numbered one, two, three, and four, of section three, containing one hundred and three acres and twenty-one hundredths of an acre. Lots numbered two and three of section five, containing eleven acres and fifty-seven hundredths of an acre. Lots numbered one, two, and three, of section seven, containing fifty-seven acres and thirty-nine hundredths of an acre. East half of northeast quarter, and lots numbered two and three of section eleven, containing one hundred and twelve acres and seventy-three hundredths of an acre. Southeast quarter, south half of northeast quarter, and lots numbered two, three, and four, of section 13, containing three hundred and thirty-five acres and sixty hundredths of an acre. East half of northeast quarter, northeast quarter of southeast quarter, and lots
210 numbered one and two of section twenty-five, containing one hundred and seventy-six acres and ten hundredths of an acre. South half and northwest quarter, and south half of northeast quarter of section thirty-five, containing five hundred and sixty acres.

Township six, range two.

North half and southeast quarter, and east half of southwest quarter of section one, containing five hundred and sixty acres and twenty hundredths of an acre. North half of southwest quarter, northwest quarter of southeast quarter, and north half of section three, containing four hundred and forty-one acres and seventy-six hundredths of an acre. All of section five, containing six hundred and forty-three acres and seventy hundredths of an acre. All of section seven, containing six hundred and forty-three acres and forty-eight hundredths of an acre. Northwest quarter, north half of southwest quarter, southwest quarter of southwest quarter, northwest quarter of southeast quarter, and southwest quarter of northeast quarter of section nine, containing three hundred and sixty acres. West half of northwest quarter, west half of southwest quarter, southeast quarter of northwest quarter, southwest quarter of northeast quarter, and northeast quarter of northeast quarter of section eleven, containing two hundred and eighty acres. All of section thirteen, containing six hundred and forty acres. North half and southeast quarter of section fifteen, containing four hundred and eighty acres. North half and southeast quarter of section seventeen, containing four hundred and eighty acres.

Township seven, range two.

All of section three, containing six hundred and thirty-six acres and thirty-eight hundredths of an acre. All of section five, containing six hundred and thirty-eight acres and twenty hundredths of an acre. Southwest quarter and south half of northwest quarter of section seven, containing two hundred and thirty-seven acres and four hundredths of an acre. All of section nine, containing six hundred and forty acres. All of section seventeen, containing six hundred and forty acres. North half of section nineteen, containing three hundred and twenty-two acres and thirty-six hundredths of an acre. West half of section one, containing three hundred and twenty acres. All of section eleven, containing six hundred and forty acres. All of section thirteen, containing six hundred and forty acres. South half of section fifteen, containing three hundred and twenty acres. All of section twenty-one, containing six hundred and forty acres. All of section twenty-three, containing six hundred and forty acres. East half of section twenty-five, containing three hundred and twenty acres.

Township nine, range two.

Northeast quarter and east half of northwest quarter of section seven, containing two hundred and forty acres. South half of northeast quarter, south half of northwest quarter, northwest quarter of northeast quarter, and south half of section seventeen, containing five hundred and twenty acres. Northeast quarter, west half of southeast quarter, 212 east half of northwest quarter, east half of southwest quarter, and southwest quarter of northwest quarter of section nineteen, containing four hundred and forty acres. North half of northwest quarter, north half of southeast quarter, and lots numbered one and two of section twenty-one, containing two hundred and eight acres. Lots numbered one, two, three, four, and five of section twenty-seven, containing one hundred and fifty-two acres.

Township three, range three.

North half of northwest quarter of section nineteen, containing eighty acres. Southwest quarter of southeast quarter, northeast quarter of southeast quarter, southeast quarter of northeast quarter, and lots numbered one, two, three, four, and five of section twenty-seven, containing one hundred and sixty-five acres and ninety-five hundredths of an acre. Southeast quarter, south half of southwest quarter, northeast quarter of northwest quarter, and lots numbered one, two, three, and four of section twenty-nine, containing three hundred and eighty-one acres and forty-four hundredths of an acre. South half of southwest quarter, south half of southeast quarter, northwest quarter of southwest quarter, and northeast quarter of southeast quarter of section thirty-one, containing two hundred and fifty-two acres and seventy-nine hundredths of an acre. Northwest quarter, and northwest quarter of southwest quarter of section thirty-three, containing two hundred acres. North half of section thirty-five, containing three hundred and twenty acres.

North half and southeast quarter, north half of southwest quarter, and lots numbered one and two of section one, containing six hundred and five acres and sixty-two hundredths of an acre. South half of southeast quarter, northeast quarter of northwest quarter, southwest quarter of northwest quarter, and northwest quarter of southwest quarter of section three, containing two hundred acres and twenty hundredths of an acre. North half of southeast quarter, southwest quarter of southeast quarter, and west half of section five, containing four hundred and forty acres and twenty-three hundredths of an acre. Northeast quarter, south half of northwest quarter, north half of southwest quarter, and lot number one of section seven, containing three hundred and forty-two acres and twenty-seven hundredths of an acre. West half of northeast quarter, west half of southeast quarter, and northeast quarter of northwest quarter of section nine, containing two hundred acres. Northwest quarter of northeast quarter and lots numbered one, two, and three of section eleven, containing sixty-eight acres and thirty-four hundredths of an acre. West half and northeast quarter and west half of southeast quarter of section thirteen, containing five hundred and sixty acres. West half of northwest quarter of section seventeen, containing eighty acres. West half of southwest quarter of section nineteen, containing ninety-four acres and sixty-four hundredths of an acre. East half of northeast quarter, west half of northwest quarter, and

214 south half of section twenty-one, containing four hundred and eighty acres. All of section twenty-three, containing six hundred and forty acres. East half and northwest quarter, and northwest quarter of southwest quarter of section twenty-five, containing five hundred and twenty acres. North half and southwest quarter and west half of southeast quarter of section twenty-seven, containing five hundred and sixty acres. Southeast quarter, east half of northeast quarter, southwest quarter of northeast quarter, northwest quarter of northwest quarter, and east half of southwest quarter of section twenty-nine, containing four hundred acres. Southeast quarter, east half of northeast quarter, and southwest quarter of northeast quarter of section thirty-one, containing two hundred and eighty acres. North half of section, north half of southeast quarter, north half of southwest quarter, and southwest quarter of southwest quarter of section thirty-three, containing five hundred and twenty acres. Southwest quarter, south half of northwest quarter, southwest quarter of northeast quarter, and northwest quarter of southeast quarter of section thirty-five, containing three hundred and twenty acres.

Township five, range three.

All of section one, containing six hundred and forty-three acres and twenty hundredths of an acre. All of section three, containing six hundred and twenty-nine acres and twenty-six hundredths of an acre. South half of northeast quarter, south half of northwest quarter, and lots numbered one and two of section five, containing three hundred and ninety-nine acres and thirty-five hundredths

215 of an acre. Northeast quarter and southeast quarter of northwest quarter, north half of southeast quarter, southeast quar-

ter of southeast quarter, northeast quarter of southwest quarter, and lot number three of section seven, containing four hundred and ten acres and two hundredths of an acre. All of section nine, containing six hundred and forty acres. All of section eleven, containing six hundred and forty acres. All of section thirteen, containing six hundred and forty acres. All of section fifteen, containing six hundred and forty acres. All of section seventeen, containing six hundred and forty acres. South half of section, south half of northwest quarter, northwest quarter of northwest quarter, and southwest quarter of northeast quarter of section nineteen, containing five hundred and twenty-six acres and seventy-eight hundredths of an acre. All of section twenty-one, containing six hundred and forty acres. All of section twenty-three, containing six hundred and forty acres. All of section twenty-five, containing six hundred and forty acres. All of section twenty-seven, containing six hundred and forty acres. North half of section, east half of southeast quarter, and west half of southwest quarter of section twenty-nine, containing four hundred and eighty acres. Southeast quarter, east half of northwest quarter, northwest quarter of northeast quarter, northeast quarter of southwest quarter, and lots numbered one and two of section thirty-one, containing four hundred and twenty-six acres and eighty-six hundredths of an acre. All of section thirty-three, containing six hundred and forty acres. North half of section thirty-five, containing three hundred and twenty acres. South half of section thirty-five, containing three hundred and twenty acres.

Township three, range four.

Northwest quarter of northwest quarter, and lots numbered one, two, three, four, five, six, seven, eight, and nine of section thirty-one, containing two hundred and twenty-seven acres and seven hundredths of an acre. East half of section and lots numbered one, two, three, four, and five of section thirty-three, containing four hundred and twenty-three acres and forty-one hundredths of an acre. South half of southwest quarter of section thirty-five, containing eighty acres.

Township four, range four.

East half and southwest quarter of section one, containing four hundred and eighty acres and eleven hundredths of an acre. East half and northwest quarter, east half of southwest quarter, and lots numbered one and two of section three, containing six hundred and forty-four acres and seventy hundredths of an acre. Northwest quarter, northwest quarter of northeast quarter, northwest quarter of southwest quarter, and lot numbered one of section seven, containing two hundred and fifty-nine acres and eighty-seven hundredths of an acre. Lots numbered one, two, three, four, five, six, seven, eight, and nine, and southeast quarter of southeast quarter of section nine, containing one hundred and eighty-six acres and sixty-seven hundredths of an acre. East half and northwest quarter, east half of southwest quarter, and lots numbered one and two of section eleven, containing six hundred and nine acres and eighty-seven hundredths of an acre. All of section thirteen, containing six hundred and forty acres. East

half of section, south half of southwest quarter, and lots numbered one, two, three, four, and five of section fifteen, containing five hundred and thirty acres and sixty-eight hundredths of an acre. Southwest quarter, south half of southeast quarter, southwest quarter of northwest quarter, and lots numbered one, four, five, seven, and eight of section seventeen, containing four hundred and four acres and sixteen hundredths of an acre. South half of section, south half of northeast quarter and south half of northwest quarter of section nineteen, containing four hundred and seventy-six acres and seventy hundredths of an acre. All of section twenty-one, containing six hundred and forty acres. All of section twenty-three, containing six hundred and forty acres. West half of section twenty-five, containing three hundred and twenty acres. All of section twenty-seven, containing six hundred and forty acres. All of section twenty-nine, containing six hundred and forty acres. All of section thirty-one, containing six hundred and forty-five acres and twenty-two hundredths of an acre. All of section thirty-three, containing six hundred forty acres. All of section thirty-five, containing six hundred and forty acres. East half of section twenty-five, containing three hundred and twenty acres.

Township five, range four.

West half of section three, containing three hundred and twenty
218 acres. All of section five, containing six hundred and thirty-four acres and eighty-eight hundredths of an acre. All of section seven, containing six hundred and forty-eight acres and thirty-eight hundredths of an acre. All of section nine, containing six hundred and forty acres.

Township three, range five.

South half of section thirty-one, containing three hundred and nineteen acres and seventy-two hundredths of an acre. South half of northwest quarter, south half of northeast quarter, and south half of section twenty-five, containing four hundred and eighty acres. South half of northwest quarter, south half of northeast quarter, and south half of section twenty-seven, containing four hundred and eighty acres. South half of section thirty-three, containing three hundred and twenty acres. All of section thirty-five, containing six hundred and forty acres.

Township four, range five.

All of section seven, containing six hundred and thirty-nine acres and twenty-six hundredths of an acre. All of section one, containing six hundred and forty acres and twenty-two hundredths of an acre. All of section three, containing six hundred and thirty-eight acres and forty-six hundredths of an acre. All of section five, containing six hundred and forty-three acres and sixty-six hundredths of an acre. All of section nine, containing six hundred and forty acres. All of section eleven, containing six hundred and forty acres. All of section thirteen, containing six hundred and forty acres. All of section fifteen, containing six hundred and forty acres. All of section seventeen, containing six hundred and forty acres. All of section twenty-
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three, containing six hundred and forty acres. All of section twenty-one, containing six hundred and forty acres. Northeast quarter of section twenty-seven, containing one hundred and sixty acres.

SOUTH OF BASE LINE AND WEST OF WILLAMETTE PRINCIPAL MERIDIAN.

Township three, range one.

West fractional half of northwest quarter, north half of southwest quarter, and north half of southeast quarter of section nineteen, containing two hundred and sixty-three acres and four hundredths of an acre. Lot number three of section twenty-five, containing nineteen acres and eight hundredths of an acre.

Township four, range one.

Lot number one of section twenty-seven, containing two acres and thirteen hundredths of an acre. Lot number one of section twenty-nine, containing three acres and fifty-six hundredths of an acre.

Township five, range one.

Lots numbered five and six of section nine, containing four acres and thirty hundredths of an acre. Northeast quarter of northwest quarter, and lots numbered one and two of section twenty-one, containing sixty-seven acres and thirty-four hundredths of an acre.

Township six, range one.

220 Northwest quarter of northwest quarter of section three, containing thirty-eight acres and ninety hundredths of an acre. Lot number one of section five, containing five acres and ninety-two hundredths of an acre. Lots numbered three and four of section seven, containing twenty-five acres and twenty-nine hundredths of an acre.

Township seven, range one.

East half of southwest quarter of northwest quarter of section eleven, containing twenty acres. Lot number three of section twenty-five, containing fourteen acres and ninety hundredths of an acre.

Township nine, range one.

Lot number five of section thirteen, containing thirty-nine acres and fifty hundredths of an acre. Northwest quarter of northeast quarter, and lot number six, of section twenty-one, containing seventy-nine acres and thirty-five hundredths of an acre.

Township ten, range one.

South half of section thirteen, containing three hundred and twenty acres. Northwest quarter, east half of southeast quarter, southwest quarter of southeast quarter, and northwest quarter of southwest quarter

of section twenty-three, containing three hundred and twenty acres. Northwest quarter, southeast quarter, west half of northeast quarter, southeast quarter of northeast quarter, east half of southwest quarter, and northwest quarter of southwest quarter of section twenty-five, containing five hundred and sixty acres. Northeast quarter of northeast quarter of section twenty seven, containing forty acres.

221 Township eleven, range one.

Northeast quarter and north half of southeast quarter of section twenty-three, containing two hundred and forty acres. South half of southeast quarter, south half of southwest quarter, and northeast quarter of southeast quarter of section twenty-five, containing two hundred acres.

Township three, range two.

Lots numbered one and two of section twenty-one, containing seven acres and sixty-seven hundredths of an acre. Northwest quarter, south half of northeast quarter, and west half of southwest quarter of section twenty-three, containing three hundred and twenty acres. Northwest quarter of northeast quarter, southwest quarter of northeast quarter, west half of southeast quarter, and lots numbered one, two, and three of section twenty-five, containing two hundred and twenty-three acres and twenty-four hundredths of an acre. Lot number five of section twenty-seven, containing twenty acres and ninety-six hundredths of an acre. Lot number six of section thirty-one, containing fifty-one acres and twenty-nine hundredths of an acre. Lots numbered four, five, and six of section thirty-five, containing thirty-five acres and seventy hundredths of an acre.

Township six, range two.

Lot number one of section twenty-five, containing three acres and ninety-two hundredths of an acre. East half of northwest quarter, northeast quarter of southwest quarter of section twenty-seven,
222 containing one hundred and twenty acres. Lot number four of section thirty-three, containing five acres and fifty-three hundredths of an acre.

Township seven, range two.

Lot number one of section one, containing ten hundredths of an acre.

Township nine, range two.

Lot number three of section twenty-nine, containing sixteen acres and seventy-five hundredths of an acre.

Township ten, range two.

Lots numbered one, two, and three of section five, containing thirty-six acres and ninety hundredths of an acre. Lot number three of section seven, containing twenty-three acres and seventy-six hundredths of an

acre. Lot number one of section twenty-three, containing thirty-nine acres and twenty hundredths of an acre. North half of northwest quarter, southwest quarter of northwest quarter, northeast quarter of southeast quarter, and south half of southeast quarter of section twenty-five, containing two hundred and forty acres.

Township thirteen, range two.

Northeast quarter of northwest quarter and northwest quarter of southeast quarter of section nineteen, containing eighty acres. Northwest quarter of northeast quarter of section twenty-one, containing forty acres. Northeast quarter, north half of northwest quarter, north half

of southeast quarter, and southeast quarter of southeast quarter of section twenty-seven, containing three hundred and sixty acres.

South half of northeast quarter of section twenty-nine, containing eighty acres.

Township one, range three.

East half of northwest quarter of section seventeen, containing eighty acres. Northwest quarter and southeast quarter, north half of southwest quarter, and southeast quarter of southwest quarter of section twenty-nine, containing four hundred and forty acres.

Township three, range three.

Lots numbered five and six of section twenty-three, containing thirteen acres and sixty hundredths of an acre. Lot number five of section twenty-nine, containing thirteen acres and fifty-five hundredths of an acre.

Township four, range three.

Lot number six of section three, containing twenty acres and five hundredths of an acre. Lots numbered ten and eleven of section thirty-five, containing eleven acres and five hundredths of an acre.

Township five, range three.

Northwest quarter of southwest quarter and lots numbered five and six of section one, containing one hundred and six acres and twenty-eight hundredths of an acre. Lots numbered two, three, six, seven, eight, ten, eleven, and twelve of section three, containing one hundred and twenty-three acres and twenty-nine hundredths of an acre. Lot number one of section five, containing three acres and ninety hundredths of an acre.

Southeast quarter of northwest quarter, northwest quarter of northwest quarter, and lots numbered three, four, five, six, and nine of section eleven, containing one hundred and seventy-nine acres and twenty-four hundredths of an acre. Lots numbered three and four of section thirteen, containing thirty-four acres and forty-seven hundredths of an acre. Southeast quarter of southeast quarter and lots numbered five, six, seven, and ten of section fifteen, containing one hundred and thirty-eight acres and seventy-five hundredths of an acre. Northeast quarter

of southeast quarter of section twenty-three, containing forty acres. Lots numbered five, six, seven, and eight of section twenty-five, containing one hundred and forty-nine acres and sixty-three hundredths of an acre.

Township six, range three.

Lot number two of section one, containing nine acres. Lots numbered three and four of section three, containing sixty-eight acres and fifty-nine hundredths of an acre. Lots numbered five and six of section nine, containing twenty acres and sixty hundredths of an acre. Lots numbered one and five of section twenty-one, containing fourteen acres and thirty-two hundredths of an acre. Lots numbered one and two of section twenty-seven, containing thirty acres and forty-eight hundredths of an acre.

Township seven, range three.

Lots numbered five and six of section three, containing eighty-seven acres and twenty-five hundredths of an acre. Lot number eleven of section fifteen, containing thirty-nine acres and thirty-eight hundredths of an acre. Lot number three of section twenty-nine, containing five acres and forty-two hundredths of an acre.

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Township eight, range three.

Lots numbered one and six of section three, containing six acres and thirty-four hundredths of an acre. Lots numbered one, two, three, and four of section thirty-one, containing twenty-eight acres and forty-six hundredths of an acre.

Township nine, range three.

Lot number five of section twenty-nine, containing fifty acres and eighty hundredths of an acre. Southwest quarter of northwest quarter and lots numbered three and four of section thirty-one, containing one hundred and thirty acres and ninety-five hundredths of an acre. West half of southwest quarter of section thirty-five, containing eighty acres.

Township one, range four.

West half of northwest quarter, northwest quarter of southwest quarter, and lots numbered one, two, and three of section three, containing one hundred and sixty-six acres and ninety-six hundredths of an acre. All of section five, containing six hundred and thirty-seven acres and ninety-five hundredths of an acre. Northwest quarter of northwest quarter and lots numbered one and two of section seven, containing fifty-seven acres and forty-six hundredths of an acre.

All of section nine, containing six hundred and forty acres. Lots numbered one, two, and three of section eleven, containing fifteen acres and eighty-six hundredths of an acre. Northwest quarter, southeast
226 quarter, and west half of northeast quarter of section fifteen, containing four hundred acres. Southwest quarter of southwest quarter of section nineteen, containing thirty-eight acres and sixty-two

hundredths of an acre. Lots numbered five and six of section twenty-one, containing six acres and ninety-six hundredths of an acre. North half of southwest quarter and lots numbered one, two, three, and four of section twenty-seven, containing one hundred and eighty-six acres and one hundredth of an acre. East half, northwest quarter, north half of southwest quarter of section twenty-nine, containing five hundred and sixty acres. Northwest quarter of northwest quarter and lot number one of section thirty-three, containing seventy-six acres and thirty hundredths of an acre.

Township two, range four.

South half of southwest quarter, south half of north half of southwest quarter, and lots numbered one, three, and four of section three, containing one hundred and seventy acres and ninety hundredths of an acre. South half of section, east half of northeast quarter of section five, containing three hundred and ninety-nine acres and forty-eight hundredths of an acre. Northeast quarter, east half of northwest quarter, and east half of southeast quarter of section nine, containing three hundred and twenty acres. Southeast quarter of southwest quarter, southwest quarter of northwest quarter, and lot number two of section eleven, containing ninety-five acres and twenty hundredths of an acre. Lots numbered one, three, four, and five of section thirteen, containing one hundred and forty-five acres and seventy hundredths of an acre. Southeast quarter, 227 east half of northwest quarter, northwest quarter of northwest quarter, and northeast quarter of southwest quarter of section fifteen, containing three hundred and twenty acres. Lot number one of section twenty-one, containing two acres and sixty-nine hundredths of an acre. North half of northwest quarter, northwest quarter of northeast quarter, and lot number one of section twenty-three, containing one hundred and fifty-five acres and fifty-six hundredths of an acre. North half of northwest quarter and south half of southwest quarter of section twenty-five, containing one hundred and sixty acres.

Township three, range four.

Lots numbered one and two of section thirteen, containing eighty-seven hundredths of an acre. Lots numbered, one, two, and three of section twenty-five, containing twenty acres and eighty-eight hundredths of an acre.

Township four, range four.

Lots numbered one and three of section one, containing twenty acres and thirty-four hundredths of an acre. Lot number one of section thirteen, containing two acres and ninety-four hundredths of an acre.

Township five, range four.

Lot number one of section nine, containing twelve acres and thirteen hundredths of an acre. North half of southwest quarter and northwest quarter of southeast quarter of section fifteen, containing one hundred

and twenty acres. Lot number one of section nineteen, containing eleven acres and ninety-two hundredths of an acre. Lots numbered 228 three and four of section twenty-five, containing two acres and sixty-eight hundredths of an acre. Lot number one of section twenty-seven, containing thirteen acres. Lot number one of section thirty-five, containing twenty-five acres and forty-four hundredths of an acre.

Township six, range four.

Northeast quarter of southeast quarter of section three, containing forty acres.

Township eight, range four.

Southwest quarter of northeast quarter and southeast quarter of northwest quarter of section thirteen, containing eight acres.

Township nine, range four.

North half of northeast quarter and lots numbered six, seven, eight, and nine of section thirty-five, containing one hundred and ninety-one acres and thirty-one hundredths of an acre.

Township ten, range four.

Lots numbered seven and eight of section fifteen, containing fifteen acres and ninety hundredths of an acre.

Township one, range five.

All of section one, containing six hundred and forty acres. East half of section three, containing three hundred and nineteen acres and seventy-seven hundredths of an acre. All of section eleven, containing six hundred and forty acres. South half and northwest quarter, north half of northeast quarter, and southwest quarter of northeast quarter 229 of section thirteen, containing six hundred acres. East half of section fifteen, containing three hundred and twenty acres. North half and southwest quarter and west half of southeast quarter of section twenty-three, containing five hundred and sixty acres. Northwest quarter of northwest quarter and lot number four of section twenty-five, containing sixty-two acres and forty hundredths of an acre. All of section twenty-seven, containing six hundred and forty acres. All of section thirty-three, containing six hundred and forty acres. West half of section thirty-five, containing three hundred and twenty acres.

Township two, range five.

East half of northwest quarter, south half of northeast quarter, northwest quarter of southeast quarter, northeast quarter of southwest quarter, and lots numbered one and two of section one, containing three hundred and three acres and seventy-one hundredths of an acre. All of section three, containing six hundred and forty acres and seventy-eight

hundredths of an acre. South half of section, south half of northwest quarter, northwest quarter of northwest quarter, and southeast quarter of northeast quarter of section five, containing four hundred and seventy-nine acres and eight hundredths of an acre. All of section seven, containing six hundred and forty-five acres and sixty hundredths of an acre. West half of section, west half of northeast quarter, west half of southeast quarter, northeast quarter of northeast quarter, and southeast quarter of southeast quarter of section nine, containing five hundred and sixty acres. All of section seventeen, containing six hundred and forty acres. All of section nineteen, containing six hundred and forty-four acres and forty-eight hundredths of an acre. North half of section, north half of southeast quarter, north half of southwest quarter, southwest quarter of southwest quarter, and southeast quarter of southeast quarter of section twenty-one, containing five hundred and sixty acres. North half of north half of southwest quarter and lots numbered one and two of section twenty-seven, containing seventy-eight acres and twenty-five hundredths of an acre. East half of northwest quarter, northwest quarter of northwest quarter, and east half of section twenty-nine, containing four hundred and forty acres. South half of northeast quarter and south half of section thirty-one, containing four hundred and three acres and ninety-seven hundredths of an acre. West half of southwest quarter, north half of northeast quarter, and lots numbered one and two of section thirty-three, containing two hundred and five acres and ninety-eight hundredths of an acre. West half of southwest quarter, east half of southeast quarter, southeast quarter of northeast quarter, and lot number one of section thirty-five, containing two hundred and eighteen acres.

Township three, range five.

Lots numbered one, two, three, and four of section one, containing sixty-five acres and twenty-six hundredths of an acre. West half of northeast quarter, west half of southeast quarter, east half of northeast quarter, and west half of section seven, containing five hundred and sixty-five acres and sixty hundredths of an acre.

Southwest quarter of section eleven, containing one hundred and sixty acres. North half of southwest quarter and lot number one of section thirteen, containing one hundred and twelve acres and forty hundredths of an acre. West half of northwest quarter, west half of southwest quarter, northeast quarter of northwest quarter and southeast quarter of southwest quarter of section seventeen, containing two hundred and forty acres. All of section nineteen, containing six hundred and fifty acres and forty hundredths of an acre. West half of southwest quarter of section twenty-one, containing eighty acres. Southwest quarter of northwest quarter and northwest quarter of southwest quarter of section twenty-seven, containing eighty acres. South half of northeast quarter, south half of northwest quarter, north half of northwest quarter, northeast quarter of northeast quarter, and south half of section twenty-nine, containing six hundred acres. All of section thirty-one, containing six hundred and fifty-five acres and seventy-four hundredths of an acre. West half of northeast quarter, west half of southeast quarter, east half of southeast quarter, southeast quarter of northeast quarter, and west half

of section thirty-three, containing six hundred acres. Lots numbered one and two of section twenty-five, containing fifty-one acres and forty hundredths of an acre. East half of northeast quarter of section thirty-five, containing eighty acres.

Township four, range five.

Lot number two of section one, containing twenty-four acres and 232 ten hundredths of an acre. Southwest quarter of northwest quarter of section eleven, containing forty acres. Lots numbered two and six of section fifteen, containing thirty-nine acres and forty-one hundredths of an acre. South half of northwest quarter and lots numbered two, three, and four of section twenty-one, containing one hundred and seventy-eight acres and sixty-six hundredths of an acre. Northeast quarter of southeast quarter and lot number one of section thirty-one, containing sixty-nine acres and sixty hundredths of an acre. North half of southeast quarter and east half of southwest quarter of section three, containing one hundred and sixty acres. Northeast quarter of section five, containing one hundred and fifty-six acres and fifty-seven hundredths of an acre. North half of section seven, containing three hundred and twenty-four acres and fifty-one hundredths of an acre. West half of northeast quarter of section nine, containing eighty acres. Southeast quarter, south half of northeast quarter, northwest quarter, north half of southwest quarter, and southwest quarter of southwest quarter of section nineteen, containing five hundred and twenty-seven acres and forty-six hundredths of an acre.

Township five, range five.

Lot number seven of section five, containing eleven acres and twenty-six hundredths of an acre. Southeast quarter of northeast quarter and lots numbered four and five of section seven, containing forty-four acres. Lots numbered one, two, three, four, five, and six of section thirty-one, containing thirty-six acres and seventeen hundredths of an acre.

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Township six, range five.

Lots numbered one and two of section seven, containing fourteen acres and thirty-eight hundredths of an acre. Lot number three of section fifteen, containing nine acres and sixty hundredths of an acre. Lots numbered one, two, three, and four of section thirty-one, containing sixty-eight acres and forty-four hundredths of an acre. Lot number six of section thirty-three, containing fifteen acres and fourteen hundredths of an acre.

Township seven, range five.

Lots numbered four and five of section seventeen, containing seventy-one acres. Northwest quarter of northwest quarter and lots numbered four, five, six, seven, and eight of section nineteen, containing eighty-seven acres and seven hundredths of an acre.

Township eight, range five.

Southeast quarter of southeast quarter of section twenty-nine, containing forty acres.

Township ten, range five.

Southwest quarter, north half of southeast quarter, and lots numbered one, two, three, and four of section seven, containing three hundred and nineteen acres and twenty-five hundredths of an acre. West half of southwest quarter of section twenty-five, containing eighty acres.

Township thirteen, range five.

Lot number two of section seventeen, containing nineteen acres and forty-three hundredths of an acre. Lots numbered three and eight of section twenty-seven, containing nineteen acres and ninety-one hundredths of an acre. Lot number three of section twenty-nine, containing six acres and seventy-seven hundredths of an acre.

Township four, range six.

East half of southeast quarter, and north half of section twenty-three, containing four hundred acres. Southwest quarter of southwest quarter of section twenty-five, containing forty acres. Southwest quarter and west half of southeast quarter of section twenty-seven, containing two hundred and forty acres. Northwest quarter, west half of northeast quarter, and north half of southwest quarter of section thirty-three, containing three hundred and twenty acres. Lots numbered one, two, and three of section thirty-five, containing thirty-six acres and two hundredths of an acre.

Township five, range six.

South half of northeast quarter and lots numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, and thirteen of section one, containing three hundred and eighty-three acres and fifty-seven hundredths of an acre. Northwest quarter of northwest quarter of section thirteen, containing forty acres. Lots numbered one, two, three, and four of section twenty-seven, containing fifteen acres and fifty-eight hundredths of an acre. East half of northwest quarter, east half of southwest quarter, northwest quarter of northwest quarter, and lots numbered one and two of section three, containing two hundred and sixty-eight acres and six hundredths of an acre. North half of northeast quarter, north half of northwest quarter, southwest quarter of northwest quarter, northwest quarter of southwest quarter, and southeast quarter of southwest quarter of section five, containing two hundred and eighty acres and eight hundredths of an acre. Lots numbered one, two, three, four, five, and six, of section seven, containing one hundred and sixteen acres and thirty-nine hundredths of an acre. East half of northeast quarter, southwest quarter of southeast quarter of section nine, containing one hundred and twenty acres. Lots numbered one, two, three, four, five, eight, nine, and ten, of section nineteen, containing two hundred and thirty-five acres and twenty-two hundredths of an acre. East half of northeast quarter, and lots numbered one and two of section twenty-one, containing one hundred and forty-five acres and forty-four hundredths of an acre. Lots numbered two of section twenty-nine, containing sixteen acres and

thirty hundredths of an acre. Lots numbered one, two, three, and four, of section thirty-one, containing sixty-one acres and forty-one hundredths of an acre.

Township six, range six.

Lots numbered one and two of section nine, containing forty-three acres and fifty-four hundredths of an acre. Lot number three of section five, containing twelve acres and seven hundredths of an acre. Southwest quarter of southwest quarter, and lots numbered two, three, and four, of section twenty-nine, containing ninety acres and seventy-five hundredths of an acre.

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Township seven, range six.

Southwest quarter of northeast quarter, and lot number one of section five, containing eighty-four acres and ninety-one hundredths of an acre. Southeast quarter, south half of southwest quarter, southeast quarter of northeast quarter, and lots numbered two, three, four, five, and six, of section nine, containing four hundred and nine acres and seventy-eight hundredths of an acre. Lots numbered seven and eight of section thirteen, containing twenty-two acres. East half of northeast quarter, west half of northwest quarter, and south half of section seventeen, containing four hundred and eighty acres. South half of section twenty-one, containing three hundred and twenty acres. East half of section twenty-nine, containing three hundred and twenty acres. All of section thirty-three, containing six hundred and forty acres. All of section seven, containing six hundred and seventy-four acres and seventy-eight hundredths of an acre. All of section nineteen, containing six hundred and fifty-eight acres and forty hundredths of an acre. West half of section twenty-nine, containing three hundred and twenty acres. All of section thirty-one, containing six hundred and sixty-one acres and ninety-eight hundredths of an acre.

Township eight, range six.

West half of section five, containing three hundred and twenty-one acres and eighty-nine hundredths of an acre. East half of southeast quarter, west half of southwest quarter, and north half of section
237 seven, containing four hundred and ninety-eight acres and eighty-two hundredths of an acre. North half of section seventeen, containing three hundred and twenty acres. All of section thirty-one, containing six hundred and thirty-nine acres and seventy-six hundredths of an acre. Northwest quarter of section thirty-three, containing one hundred and sixty acres. East half of section five, containing three hundred and twenty-one acres and sixty-nine hundredths of an acre. All of section nine, containing six hundred and forty acres. Lots numbered one and two of section twenty-one, containing twenty-nine acres and ninety-six hundredths of an acre. Lots numbered one and two of section twenty-seven, containing forty-nine acres and fifty-five hundredths of an acre. North half of northeast quarter, and southwest quarter of northeast quarter of section thirty-three, containing one hundred and twenty acres. Lot number four of section thirty-five, containing twelve acres and fourteen hundredths of an acre.

Township nine, range six.

Southeast quarter of northwest quarter, northeast quarter of southwest quarter, and south half of southeast quarter of section three, containing one hundred and sixty acres. Lots numbered four, five, six, seven, and eight, of section fifteen, containing forty-six acres and eighty-seven hundredths of an acre. Northeast quarter, north half of northwest quarter, and northeast quarter of southwest quarter of section twenty-one, containing two hundred and eighty acres. Lot number two of section twenty-three, containing eleven acres and ninety hundredths of an acre. Lots numbered four, five, six, seven, eight, and nine, of section twenty-five, containing ninety-one acres and ninety hundredths of an acre. Lots numbered five and six of section twenty-nine, containing sixty-eight acres and thirty-two hundredths of an acre. Lots numbered one, seven, eight, and nine, of section thirty-three, containing seventy-three acres and fifty-five hundredths of an acre. East half of northeast quarter, northwest quarter of northeast quarter of section thirty-five, containing one hundred and twenty acres. North half of southeast quarter, and north half of section five, containing four hundred and six acres and thirty-six hundredths of an acre. Southwest quarter, north half of southeast quarter, and north half of section seven, containing five hundred and seventy-five acres and seventy-six hundredths of an acre. Northeast quarter of section seventeen, containing one hundred and sixty acres. All of section nineteen, containing six hundred and sixty-five acres and forty hundredths of an acre. Lots numbered three and five of section thirty-one, containing forty-five acres and thirteen hundredths of an acre.

Township ten, range six.

West half of northwest quarter and southwest quarter of section seven, containing two hundred and sixty acres and forty-two hundredths of an acre. Southwest quarter of south half of northwest quarter of section three, containing two hundred and forty acres. Lots numbered eight and nine of section five, containing twenty-eight acres and fifty hundredths of an acre. Southeast quarter and south half of northeast quarter of section seven, containing two hundred and forty acres. Lots numbered two, three, and four, of section nine, containing sixty-eight acres and thirty-nine hundredths of an acre. Lot number five of section eleven, containing thirteen acres and ninety-two hundredths of an acre. East half of northeast quarter and lots numbered one and two of section thirteen, containing one hundred and fifty-four acres and seventy-eight hundredths of an acre. Northwest quarter of northwest quarter and lot number two of section seventeen, containing fifty-two acres and twenty-four hundredths of an acre.

Township thirteen, range six.

South half of southwest quarter of section five, containing eighty acres. South half of section, south half of northeast quarter and south half of northwest quarter of section twenty-one, containing four hundred and eighty acres. West half of southwest quarter of section twenty-three, containing eighty acres. North half of section twenty-five, containing three hundred and twenty acres. North half and southeast

quarter of section twenty-seven, containing four hundred and eighty acres. Southeast quarter of section twenty-nine, containing one hundred and sixty acres. Southeast quarter of section thirty-one, containing one hundred and sixty acres. All of section thirty-three, containing six hundred and forty acres. North half of section, north half of southeast quarter, north half of southwest quarter, and southeast quarter of southeast quarter of section thirty-five, containing five hundred and twenty acres.

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Township five, range seven.

North half of northeast quarter, northeast quarter of northwest quarter, and west half of southeast quarter of section one, containing two hundred and three acres and eighty-seven hundredths of an acre. Southwest quarter, south half of northwest quarter, southwest quarter of northeast quarter, south half of southeast quarter, and northwest quarter of southeast quarter of section eleven, containing four hundred acres. Lots numbered one, two, three, four, five, six, seven, eight, and nine of section thirteen, containing one hundred and ninety acres and forty-five hundredths of an acre. North half of section, and southwest quarter, north half of southeast quarter, and southwest quarter of southeast quarter of section fifteen, containing six hundred acres. All of section twenty-one, containing six hundred and forty acres. Northeast quarter of northwest quarter, south half of southwest quarter, and lots numbered four, five, and six of section twenty-three, containing one hundred and fifty-four acres and thirty-three hundredths of an acre. Northeast quarter and lots numbered one and four of section twenty-seven, containing one hundred and eighty-five acres and ninety-five hundredths of an acre. Southwest quarter and lots numbered one, two, three, four, five, six, seven, eight, and nine of section thirty-three, containing three hundred and seventeen acres and seventy hundredths of an acre. Lots numbered one and two of section thirty-five, containing twenty-seven acres and three hundredths of an acre.

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Township six, range seven.

Northwest quarter, south half of northeast quarter, and northwest quarter of southeast quarter of section three, containing two hundred and seventy-six acres and eighty-five hundredths of an acre. Lots numbered one and two of section nine, containing fifty-six acres and fifty-six hundredths of an acre. Southwest quarter, south half of northwest quarter, northwest quarter of northwest quarter, and lot number one of section twenty-one, containing three hundred and five acres and fifty hundredths of an acre. Lot number four of section twenty-three, containing fifteen acres and forty-one hundredths of an acre.

Township ten, range seven.

North half and southwest quarter, west half of southeast quarter of section one, containing five hundred and ninety acres and thirty hundredths of an acre. North half of northeast quarter, northeast quarter of northwest quarter, southeast quarter of northeast quarter, and northeast quarter of southeast quarter of section eleven, containing two hundred acres. Lots numbered one and two (fractional north half of

northeast quarter) of section thirteen, containing fifty-eight acres and forty-five hundredths of an acre.

Township twelve, range seven.

Southeast quarter of section twenty-one, containing one hundred and sixty acres. South half of northeast quarter and northwest quarter of northeast quarter of section twenty-nine, containing one hundred and twenty acres. All of section thirty-three, containing six hundred and forty acres.

Township thirteen, range seven.

West half of northwest quarter, south half of southeast quarter, and lots numbered one, two, three, four, five, six, seven, and eight of section twenty-nine, containing three hundred and five acres and thirty-nine hundredths of an acre. North half and southwest quarter, north half of southeast quarter, southwest quarter of southeast quarter, and lot number one of section thirty-one, containing six hundred and fourteen acres and seventy-five hundredths of an acre.

The said tracts, as described in the foregoing pages from two to twenty-two, inclusive, containing the aggregate area of (120,237 46-100) one hundred and twenty thousand two hundred and thirty-seven acres and forty-six hundredths of an acre.

Now, know ye that the United States of America, in consideration of the premises and pursuant to the said acts of Congress, have given and granted, and by these presents do give and grant, unto the said Oregon and California Railroad Company, of Oregon, and to its successors, all the tracts of land described in the foregoing.

To have and to hold the same, with the appurtenances, unto the said Oregon and California Railroad Company, of Oregon, and to its successors and assigns, forever.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-sixth.

By the President.

[SEAL.]

U. S. GRANT.

By J. PARRISH, *Secretary*.

By C. B. BOYNTON,

Recorder of the General Land Office.

(Endorsed:) Filed Feb. 3, 1893. R. H. Lamson, clerk.

In the United States circuit court, ninth district.

THE UNITED STATES, PLAINTIFF,

vs.

THE OREGON AND CALIFORNIA RAILROAD } No. 1982.

Company et al., defendants.

Testimony taken before F. S. Lafferty, examiner.

Before F. S. Lafferty, special examiner; Hon. D. R. Murphy, United States district attorney, appearing for plaintiff, and Messrs. Bronaugh, McArthur, Fenton and Bronaugh, for defendants.

244 ROBERT A. HABERSHAM, sworn on behalf of plaintiff:

Direct examination. Questions by Mr. MURPHY:

Q. State your name, residence, and occupation.

A. Robert A. Habersham; Portland, Oregon; civil engineer.

Q. How long have you been a civil engineer?

A. I began in 1857—thirty-seven years.

Q. You have been following the occupation of civil engineer for the last thirty-seven years?

A. I have.

Q. Are you acquainted with the topography of the country north of the 45th parallel of latitude, and up to the British line?

A. Not up to the British line.

Q. How far north do you know the topography of the country?

A. From Pasco, on the Northern Pacific, to Puget Sound and up to Bellingham Bay, within six miles of the British boundary, and south of that.

Q. What is the character of the country?

Mr. FEXTON. I object to that as incompetent, irrelevant, and immaterial. I suppose objections can be reserved.

Mr. MURPHY. This is all taken subject to objection.

Q. What is the character of the country north of the 45th parallel of latitude?

A. It is mountainous and heavily timbered from a line on the east watershed of the Cascade Range westward to the coast. From that line eastward it is mountainous and not timbered generally.

Q. You may state what feasible and practical routes there are for a railroad with its terminus at or near Portland, in the State of Oregon, from a point three hundred miles east of Puget Sound.

(Same objection.)

A. Well, as an engineer, I would say the best line was down the Columbia, on the banks of the Columbia as nearly as practicable.

Q. Could a railroad, from a point three hundred miles east of Puget Sound to Portland, run in any other line than down one of the banks of the Columbia?

A. Yes, sir.

Q. How could that railroad arrive at Portland?

A. From my knowledge of the Cascade Range south of Stampede Pass, partly from personal knowledge by railway surveys, and partly from maps made by other engineers, I think that the best route—well, there are two routes, I can not say which is best, one I am not very familiar with—there are two routes, one from Pasco up into and through the Klickitat Valley westward through Camas prairie down the Lewis River to the east fork at Louisville; thence across to the banks of the Columbia at La Camas; thence crossing the Columbia and coming down. There is a better place to cross at Lady's Island than to come down to Vancouver. The other route would be to leave the Northern Pacific at North Yakima

and come up Attahanan Creek to Cispus Pass; thence on a ridge line to Klickitat Pass, and from there down the same as the route I have described from the Klickitat to the Columbia.

Q. How far east of Portland is La Camas?

A. About sixteen or eighteen miles.

Q. Would either of these routes that you have described reach Portland by way of the valley of the Columbia?

A. Not through its entire length.

Q. How much of the line would be located in the valley of the Columbia?

A. It depends upon what you call the valley of the Columbia. The portion adjacent to the river varies in width from a mile to four, five, or six miles sometimes, but if you call all of the watershed that drains into the Columbia a portion of the valley, then it extends from Klickitat Pass down to the mouth of the Lewis River. That is not, however, usually called the valley of the river, but the watershed, the drainage basin.

Q. You may describe the valley of the Columbia from Portland eastward to Pasco?

A. It is some five or six miles wide at Vancouver; across to the peninsula, between three and six miles, it varies considerably, and then it narrows until about at the Cascade gorge it is only six or seven hundred feet wide; above that it varies in width; above the Cascades from a quarter of a mile to half a mile to three-quarters. It is mountainous on both sides from the Sandy River up to Wallula; there the east bank is not so precipitous, and above Pasco I do not, of my personal knowledge, know anything.

Q. About how far east of Portland is Pasco?

247 A. About two hundred and forty-five miles in longitude, just looking at the map.

Q. How far north of the Columbia River are these two routes, the two routes that you have described?

A. Cispus Pass is about sixty and Klickitat Pass about forty to forty-five by this map.

Q. That is miles?

A. From forty to forty-five the Klickitat and sixty Cispus Pass by this map.

Q. What route do you consider the most eligible railroad route from a point three hundred miles east of Puget Sound to Portland?

A. For cheapness of operation, the line down the Columbia River.

Q. Following either the north or south bank?

A. Yes, sir. For cheapness of construction I have never made any comparative estimate.

Mr. MURPHY, Plaintiff now offers in evidence map of the States of Washington and Oregon and part of Idaho, marked "Map of the Department of the Columbia," projected and compiled by the Engineer's Office, Department of the Columbia, by Lt. Thomas W. Symons, and ask to have the same marked. Marked "Plaintiff's Exhibit A, Oct. 22d, '94."

Cross-examination. Questions by Mr. FENTON:

Q. Where would your line through the Cispus Pass that you speak of go with reference to the Lewis River?

A. I did not run any line.

Q. I mean the line in your testimony?

248 A. The Cispus Pass is at the head of Cowlitz River; to go to Lewis River, the line from Cispus Pass would have to be a ridge line running along the top of the mountains, more or less, to Klickitat

Pass, and thence down Lewis River, down the North Fork of Lewis River.

Q. Where does the Cowlitz River empty into the Columbia River?

A. About six miles below Kalama.

Q. Where is Kalama with reference to Portland?

A. Thirty-eight miles by the steamboat channel.

Q. In what direction?

A. Northwest. Let me answer that correctly. [Refers to map.] Kalama is almost due north from Portland—a little west of north.

Q. Then a practical route for a railroad passing through Cispus Pass might be brought down the Lewis River if it were extended along the ridge as you say?

A. So I am informed by the engineer who made the reconnoissance.

Q. From your general knowledge of the general topography of Washington and of the streams of water that put into the Columbia on the north side, whose head waters rise in the Cascade Mountains, what would be your judgment independent of any hearsay?

A. My judgment as to what?

Q. As to the feasibility of such a route.

A. There is no doubt that such a route can be built and operated.

Q. When you speak of the Cowlitz River rising in Cispus Pass
249 can you say whether the route might not follow the Cowlitz River in its general course to the Columbia?

A. I am not familiar with that part of the country. The question of practicability and engineering is a question of money.

Q. Where does the Cowlitz River empty into the Columbia?

A. At what is called Kelso, about six miles north of Kalama; that is, just below Carroll's Point, on the Columbia.

Q. Then if it is still further west than Kalama would it be from Portland west or north?

A. It is still farther north. Monticello I meant to mention as the town at the mouth of the Cowlitz.

Q. Would there be any difficulty in maintaining this road from the mouth of the Cowlitz River or Lewis River either from the north bank of the Columbia River and thence across to Portland; I mean in an engineering sense?

A. The road would come from Kalama, if it came down the Cowlitz to the north bank of the Columbia to Vancouver and across there, or if it came down the Lewis River it would come out a little above St. Helens and above the north bank of the Columbia to Vancouver, the same as the other one, or it would cross at Kalama or other points.

Q. Or it would cross at Kalama or other points as now, crossing to the south bank of the Columbia and to Portland?

A. Yes, sir; it could. I had not thought of that as coming into my question.

250 Q. What can you say as to the number of passes in the Cascade Mountains between the Columbia River and the British line, the north boundary line of the United States?

A. The Northern Pacific in 1872 surveyed through, beginning at the British boundary and enumerating southward, as nearly as I can remember, surveyed lines through Skagitt Pass, Snoqualmie Pass, and south of

the Snoqualmie Pass is the Stampede Pass—whether they surveyed this pass I don't know—and south of Stampede Pass are Cispus and Klickitat passes, and there is a pass about ten miles south of Klickitat Pass, but it is higher, and has never been given any consideration at all.

A. You say that what constitutes the valley of the Columbia depends upon what those words mean. Is it not true that when applied to a territory of country drained by a great river and its tributaries that it applies to the watersheds, including the various tributaries, rather than to the gorge through which the main river finds its way to the sea?

A. Geographically the term valley is used frequently to include the whole draining basin or watershed; in engineering terms, it means the vicinity of the river.

Q. Well, what is the valley of the Columbia River between Kalama and Astoria?

A. You mean its character?

Q. Yes; what is it? What extent of country would it be as defined by you?

A. Well, it depends upon how the term valley is used. Its
251 drainage basin would be from the crest of the ridge on both sides; but speaking generally of the river, the Columbia has no valley—no valley land. It is a term difficult to discriminate with.

Q. Is it not true, as a matter of fact, popularly speaking, that the Columbia River from its confluence with the Snake River to its mouth, the Pacific Ocean, has no valley in the sense in which the word is used ordinarily?

A. There is little or no valley land.

Q. Is it not true, that for the greater part of its distance the water of this river passes through what properly might be called a gorge, and that for a distance of one hundred miles east of Portland it passes through a gorge situated in the Cascade Mountains with no valley either side of its waters?

A. Yes.

Q. East of this point, which, for convenience, we will note as The Dalles, and to Pasco, or the mouth of the Snake River, is it not true, that the Columbia is still located in a gorge of the mountains rising on either side almost immediately from the water's edge, or with tributaries from either side emptying into it through deep gorges, with plateaus on either side of such tributaries extending a considerable distance from the Columbia River?

A. Plateaus.

Q. Elevated tracts of lands on either side of its tributaries?

A. I did not understand the last part of your question.

Q. (Question read.)

A. In this reach of the river, between The Dalles and Pasco, there are jutting points, notably one at what is called Hell Gate, just
251 above Celilo; but a large portion of its extent the land rises back from the river at a comparatively easy slope, so that it is good agricultural land, lacking only irrigation. Above Umatilla, on the Oregon side, there are precipitous bluffs, and there are others smaller at points below on the river—I say from Celilo up to Pasco. From The

Dalles to Wallula, except two or three miles near The Dalles, it is almost precipitous—almost vertical.

Q. Can you give any idea of the elevation above the river of these plateaus or tracts of land?

A. The rock at Hell Gate I measured, and that is about one hundred and twenty feet, as near as I remember, vertically. The basaltic cliffs which flank the river at points between Celilo and Pasco, vary in height two or three, four or five hundred feet, some of them, and there is generally a bench between the cliff and the river, as at Grant Station.

Q. What is the width of this bench, ordinarily?

A. Oh, it varies from twenty-five to fifty, to one hundred, to five hundred feet.

Q. Is it continuous or broken?

A. It is broken at several points; I don't remember.

Q. What is the topography of the watershed of the river on its north bank, in so far as the mountains and bluffs are concerned, between The Dalles and Pasco?

A. It is not so rough on the north side as it is on the south side. It has ravines running along at short intervals, half a mile, a mile, or two miles, heading up into the Simcoe Ridge, which separates the valley of the Yakima from the Columbia proper.

251½ Q. Where does this ridge first begin to rise, with reference to the water of the Columbia River?

A. Simcoe Ridge is a spur of Mt. Adams, running east of it and east of Klickitat Pass. All the streams that flow from the Simcoe Ridge run into the Columbia on its north bank.

Q. Then there is no valley proper immediately next to the north side of the Columbia River?

A. Very little of what is called valley land, agriculturally, and with the exception of Klickitat Valley, which is upon a ridge from six hundred to twelve hundred feet above the river, a large flat extent of country, known, part of it, as the Horse-heaven country, and all of it included in the Klickitat Valley.

Q. All the Klickitat Valley is on either side of what is called the Klickitat River, which puts into and is a tributary of the Columbia?

A. That is the Klickitat Valley proper, but they extend the name east as far as Cleveland and Bickleton.

Q. What is the topography of the country lying up the river beyond Pasco and up towards the British line?

A. Of my own knowledge, I can not say.

Q. In illustrating the extent of a valley, I will ask you if you would not, in your definition of a valley, include in the Willamette Valley the Yamhill Valley and its tributaries?

A. It is generally so included.

Q. In speaking of your opinion that for cheapness of operation the road down the Columbia River gorge, along the river, would be practical and profitable, did you mean to include the item of maintenance

252 in the operation, or did you merely mean that of construction? It might be more cheaply operated without regard to renewals or maintenance.

A. Maintenance is one of the items of operation.

Q. In your definition?

A. In railroad terms; you can not operate a railroad unless you maintain it. The cost of construction should be regulated with regard to obtaining of a permanent roadbed, and it is sometimes necessary to do very expensive work in order not to have to do it all over again whenever a flood or other occurrence of like nature happens.

Q. Do you know, as a fact, that the track between Portland and Umatilla Junction, owned and operated by the Oregon Railway and Navigation Company and located on the south bank of the Columbia River, has, during the current year, been largely destroyed by floods of the Columbia River?

(Objected to as immaterial.)

A. I know it as the public know it. I have not been over the line since then, but I have no doubt of it.

Q. From your knowledge of the river, and of the extent of the flood, have you any doubt as to the destruction of the track where it was located, and where it was best to locate it in great part by reason of the flood?

A. Have I any doubt of it?

Q. Yes, sir.

A. Well, from what I heard, and I have not heard it denied, a large portion of it has been destroyed.

Q. Would you not obviate any danger to the destruction of the railroad track, and its operation, by choosing either of those routes mentioned by you, and avoiding the route down the Columbia River?

A. To some extent, to a great extent, yes; but there might occur floods on the Lewis River which would carry away a considerable portion of the road also. You can not provide absolutely against any danger.

Q. There would not be such an extent of road liable to be flooded on the Lewis River road, would there be?

A. The banks of the Columbia could be made safe from flood, or any other river, by building the road higher up, where no flood short of a deluge could reach it. It is just a question of the grade of the road.

Q. Do you know, of your own knowledge, as an engineer or otherwise, of the dangerous character of landslides along the line of railroad, which have occurred in the Columbia River gorge, called the Cascades?

A. On which side of the river?

Q. On the side where the railroad is now located and operated by the O. R. & N. Co.

A. Yes, sir; I do.

Q. Does not that present to your mind an objection to this route difficult to overcome, and an objectionable feature to the location of a road at that point?

A. I surveyed and located the Northern Pacific Railroad from Bonneville to Portland in 1872, and in 1874 I surveyed the site where they are now building the Cascade locks, on both sides of the river, giving the same attention to both sides, and from the Cascade locks down to Bonneville the whole superstructure on the Oregon side rests on an inclined plane

of sandstone, slippery, and I noted, from the size of the locks down to Warrendale, where a big slide occurred, and remember going back into the mountains for the purpose of examining the stability or probable stability of the soil. I noticed cracks running along longitudinally with the river bank, showing this portion of it slipping into the river had been going on for centuries, probably. At this place particularly, where the big slide occurred at Warrendale, I went a quarter of a mile back from the river for the purpose of examining that carefully, and I so reported in my report to the chief engineer that putting a railroad there they were going to have trouble. I can say I saw no indications of slides on the Washington side.

Q. Did you not discover any indications of a landslide on the north bank of the Columbia River, opposite the cascades on the mountain?

A. None of any extent near the river. There were evident landslides which are visible a mile or two back in the mountains, at a great elevation.

Q. What is the fact as to beneficial features, if any exist, with reference to those two routes you have named for a railroad, in regard to local business, or country through which it passes supporting and maintaining the road?

A. A railroad through the Klickitat Valley, from Pasco to Trout Lake, would get very little more freight than it would down the edge of the Columbia; from Trout Lake up through Klickitat Pass down to the Lewis River and across to the Columbia it would have an immense logging business, and also transportation of coal, which exists in large quantities along the line. There would be little or no business for a railroad on the north bank of the Columbia; that is, local business, from White Salmon down to Washougal, not that I know of.

Redirect examination:

Q. You may state as to whether or not the flood to which counsel referred as destroying a portion of the road along the bank of the Columbia River was an ordinary or an extraordinary event.

A. It was an extraordinary—the highest flood on record.

Q. Do you know whether or not the floods prior to that time had submerged or destroyed any portion of the O. R. & N. track anywhere between here and Umatilla?

A. During high water I was told by the engineers that one trestle located in an eddy had been carried away by the foundations being cut out from under it, and I do not remember, except perhaps some little occasional breakage, of any serious damage to the railroad line by any previous flood.

Q. How long has that railroad been constructed there?

A. It was constructed about—well, about eleven years ago, I believe, when Mr. Villard came here.

Excused.

R. A. HABERSHAM.

356 In the circuit court of the United States, ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF, }
vs.
 THE OREGON AND CALIFORNIA RAILROAD COMPANY }
 et al., defendants.

Stipulation.

Pursuant to stipulation, the parties hereto appearing by their counsel, Hon. Daniel R. Murphy, United States district attorney, and Hon. John M. Gearin, representing the United States, and Hon. L. E. Payson and Hon. W. D. Fenton, representing the defendant, appeared before F. S. Lafferty, special examiner, on this 13th day of December, 1894, in the United States court building, and thereupon the following proceedings were had on behalf of the defendant:

It was thereupon stipulated by the parties hereto that all questions as to the relevancy and competency of the evidence offered at this hearing be considered reserved.

MR. PAYSON. We offer first a certified copy of letter from the Interior Department, dated August 4th, 1870, signed Edwin F. Johnson, and addressed to Hon. J. D. Cox, Secretary of the Interior.

(Received and marked "Defendants' Exhibit B.")

257

Defendants' Exhibit B.

NORTHERN PACIFIC RAILROAD COMPANY,

ENGINEER'S OFFICE,

120 Broadway, New York, Aug. 4, 1870.

Hon. J. D. COX, Sec'y of Interior.

DEAR SIR: From information received from my assistants in Montana and Idaho since my return here from Washington, it is probable the Northern Pacific Railroad Company may wish to vary the location of that portion of their line situated between the mouth of Boulder Creek on Jefferson River, in Montana, and the Columbia River.

There is reason to fear that the valley of the Salmon River may be found impracticable, in which case the company will be compelled to take the next valley to the north of it—the Clearwater.

The president of our company is absent for some days in Minnesota, and I desire you not to take any action on the portion of the route named until he returns, or I can communicate with him.

Yours, very respectfully,

EDWIN F. JOHNSON,
Engr. in Chf. N. Pacific R. R.

Certificate in pursuance of section 882 of the Revised Statutes, attached, certifying to true copy of original on file in Interior Department, dated August 7, 1894, signed by Wm. H. Sims, Acting Secretary of the Interior, and under seal of the Interior Department.

258 Mr. PAYSON. We next offer copy of resolutions of the board of directors of the Northern Pacific Railroad Company, attested by George H. Earl, and certificate of Edward A. Bowen, dated August 9th, 1894.

(Received and marked "Defendants' Exhibit C.")

Defendants' Exhibit C.

Exhibit B. On Mr. Fargo's motion it was

"Resolved, That the president cause a preliminary location, with a map of the main road of the Northern Pacific Railroad Company, commencing at Whatecom, on Puget Sound, thence running southerly on the easterly side of the said sound to Portland, in Oregon, and from the point where the said road crosses the Columbia River, and on the north side thereof and by the valley of the said river to the mouth of the Snake River, to be filed in the office of the Secretary of the Department of the Interior at Washington at as early a day as practicable. Also to cause a like preliminary location, with a map of the main line from the point on the Red River where the said road may cross the said river, running thence to the Missouri River at the point of intersection of the Yellowstone with the Missouri, and thence up the valley of the Yellowstone to a point in the Rocky Mountains, which shall be common to a line to be run either down the valley of the Salmon River or the Clearwater River, and to file said map with the Secretary of the Interior at Washington."

I, George H. Earl, secretary of the Northern Pacific Railroad Company, hereby certify that the foregoing is a true copy of a resolution adopted by the executive committee of the board of directors of
259 said company on July 8, 1870, as appears in the records of the proceedings of said company.

In witness whereof I have hereunto set my hand and the seal of said company this 2nd day of May, 1893.

[SEAL.]

GEO. H. EARL,

Secretary of the Northern Pacific R. R. Co.

Exhibit C (continued).

Meeting of October 26, 1870. Present, Messrs. Smith, Rice, Fargo, Felton, Wright.

The president presented and read the following statement of the transactions of the company since the last meeting of the board of directors:

"Location of the line: In July last a map was prepared showing a located line of our road from Montreal River, on Lake Superior, to a point in Washington Territory opposite the mouth of the Walla Walla River. The line was thus laid down on the map as an approximate line only, and with the approbation of the Secretary of the Interior, and with the understanding that, as the located line of our road was made from actual surveys, the company might have the privilege of changing the line so as to conform to the actual location, and hold the lands granted according to such final survey.

"With this understanding, the map, with the line above described traced upon it, was filed in the Department of the Interior, and the request made that the lands granted should be withdrawn by the Department.

Subsequent to the filing of the map, and before any action was taken thereon by the Department, the engineer in chief, having received from the engineers in the field in the valley of the Salmon River intelligence that that route proved impracticable for a road owing to its deep canyons, notified the Secretary of the Interior that so much of said line in Montana and Idaho as pertained to the Salmon River route was withdrawn, and requesting no action by the Department thereon. Notice was afterwards received by me from the Secretary of the Interior that our map was received and filed, and that the lands to the extent of twenty sections per mile in Minnesota and Oregon and Washington Territory were withdrawn up to Steilacoom, but that the Department objected to withdrawing lands to the boundary line. Afterwards, in a letter, the Secretary consents to withdraw the land to Seattle to the extent of twenty sections to the mile."

I, George H. Earl, secretary of the Northern Pacific Railroad Company, hereby certify that the foregoing is a true copy of an extract from the record of the proceedings of the executive committee of the board of directors of said company, at a meeting thereof held on the 26th day of October, 1870.

In witness whereof I have hereunto set my hand and the official seal of said company this 2nd day of May, 1893.

[SEAL.]

GEO. H. EARL,

Secretary Northern Pacific R. R. Co.

Certificate of true copy of original papers on file in the General Land Office, dated August 9, 1894, signed by Edward A. Bowen, Acting Commissioner of the General Land Office, and seal of General Land Office attached.

Mr. PAYSON. We next offer a copy of a letter dated August 5th, 1870, signed "J. D. Cox, Secretary," addressed to Edwin F. Johnson, under certificate of August 7th, 1894.
(Received and marked "Defendants' Exhibit D.")

Defendants' Exhibit D.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., August 5th, 1870.

Sir: I have received your letter of the 2nd and 4th instant, the first relating to the legislation as to the main line and branch of the Northern Pacific Railroad, and the second stating it may be necessary to change the route of the road in Idaho from the valley of the Salmon River to that of the Clearwater, and asking suspension of action on that portion of the map until you can advise with the president of the company.

In reply, I state that I see no objection to a compliance with your request, and action will be accordingly suspended.

Very respectfully, your obedient servant,

J. D. COX, *Secretary.*

EDWIN F. JOHNSON,

Engr. in Ch'f, N. P. R. R. Co., 120 Broadway, New York.

Certificate of true copy of original on record in Interior Department, dated August 7th, 1894; seal of Department attached and signed by Wm. Sims, Acting Secretary of the Interior, attached to foregoing.

262 Mr. PAYSON. We next introduce affidavit of J. Gregory Smith, before George T. Childs, notary public, under certificate of Edward A. Bowen, dated August 9th, 1894.
(Received and marked "Defendants' Exhibit E.")

Defendants' Exhibit E.

EXHIBIT E. STATE OF VERMONT,
County of Franklin, ss:

J. Gregory Smith, being duly sworn, deposes and says: That he is a resident of the State of Vermont; that during 1870, 1871, and 1872 he was president of the Northern Pacific Railroad Company, and as such had personal supervision and charge of arranging for and filing with the Secretary of the Interior the maps of the Northern Pacific Railroad; that the map of said road, filed August 13, 1870, was filed with the Secretary of the Interior with the express understanding between the said Secretary and the Northern Pacific Railroad Company, that the line designated upon said map was an approximate line only of the map of the general route, and that the same might be changed thereafter, provided the company ascertained from actual survey, or otherwise, that the route marked on said map was impracticable; that the company, after the making of such arrangements and filing said map, did find the route designated thereon impracticable, and before the Secretary of the Interior had acted thereon, and before the approval of said map, and in pursuance of said agreement and arrangements entered into as aforesaid, the company

263 notified the Secretary of the Interior of the impracticability of said route, and of its withdrawal of said map as to so much of said line as was located in Western Montana, Idaho, and to the Columbia River, in Washington; that at the time of filing of said map it was distinctly understood, as aforesaid, that if the company found the said route, or any portion of it, impracticable, the company might withdraw said preliminary map and file a map of general route, and that in pursuance of said agreement and understanding the Northern Pacific Railroad Company did, on the 21st day of February, 1872, file its map of general route, and the then Secretary of the Interior, in pursuance of the agreement and understanding aforesaid, and under the authority then vested in him, did receive for filing and did approve said map so filed on the 21st day of February, 1872, and deponent further says that on the 26th day of October, 1870, as president of the Northern Pacific Railroad Company, he made to said company a report in the words and figures following, to wit:

"In July last a map was prepared showing a located line of our road from Montreal River, on Lake Superior, to a point in Washington Territory opposite the mouth of the Walla Walla River. The line was thus laid down on the map as an approximate line only, and with the approbation of the Secretary of the Interior, and with the understanding that as the located line of our road was made from actual surveys the company might have the privilege of changing the line so as to conform to the actual location and hold the lands granted according to such final survey. With this understanding the map with the line

264 above described traced upon it was filed in the Department of the Interior, and the request made that the lands granted should be

withdrawn by the Department. Subsequent to the filing of the map and before any action was taken thereon by the Department, the engineer in chief having received from the engineers in the field, in the valley of the Salmon River, intelligence that that route proved impracticable for a road owing to its deep canyons, notified the Secretary of the Interior that so much of said line in Montana and Idaho as pertained to the Salmon River route was withdrawn and requesting no action by the Department thereon. Notice was afterwards received by me from the Secretary of the Interior that our map was received and filed and that the lands to the extent of 20 sections per mile in Minnesota and Oregon and Washington Territory were withdrawn up to Steilacoom, but that the Department objected to withdrawing lands to the boundary line. Afterwards in a letter the Secretary consents to withdraw the lands to Seattle to the extent of 20 sections to the mile."

That the facts set forth in said report are true.

J. GREGORY SMITH.

STATE OF VERMONT,

County of Franklin, ss:

At St. Albans, in said county, on this 20th day of May, A. D. 1890, personally appeared J. Gregory Smith, to me known, who made oath that the foregoing statement by him subscribed was true according to his best knowledge, information, and belief.

Before me:

[SEAL.]

GEO. T. CHILDS, *Notary Public*.

265 Certificate of true copy of affidavit on file in General Land Office, dated August 9th, 1894, under seal of General Land Office and signed by Edward A. Bowen, Acting Commissioner of the General Land Office attached.

Mr. PAYSON. We next offer certain papers, the first being headed "Department of the Interior, Washington, D. C., October 12th, 1870," under certificate of Edward A. Bowen, Acting Commissioner of the General Land Office, dated August 9th, 1894.

(Received and marked "Defendants' Exhibit F.")

Defendants' Exhibit F.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Oct. 12th, 1870.

SIR: I transmit herewith an affidavit of the president and engineer in chief of the Northern Pacific Railroad Company, with a map designating the route of said company's road through Minnesota.

The company, as shown by this map, have changed the route of their road in Minnesota.

The withdrawal heretofore ordered you will cause to be made to conform to the route designated on the map, and the lands now withdrawn and not within twenty miles of this route to be restored.

Very respectfully, your obedient servant,

J. D. COX, *Secretary*.

Hon. JOS. WILSON,

Commissioner of the Gen'l Land Office.

266 (Indorsement:) Letter 1 J, 19893. Dept. of the Interior, Secretary. Oct. 12, 1870. Division 13, 63. Transmits aff'dt of the president & engineer in chief of the N. P. R. R. Co. Also map designating the route of said company, and directs that the withdrawal of lands be made to conform with the route designated. (R) Minnesota Immediate. Ref'd to Div. "F." Reed. (G. L. O.) October 13, 1870.

STATE OF NEW YORK,

County of New York, ss:

YORK CITY, *October 1st, 1870.*

Edwin F. Johnson, of the city, county, and State of New York, deposes and says that he is the engineer in chief of the Northern Pacific Railroad Company, and that he has been such engineer in chief since June, A. D. 1866.

That during the period above mentioned surveys and explorations have been made on various portions of the route proposed for said road for determining its proper location, and that on the thirtieth day of July last, by direction of the board of directors of said railroad company, a written description of an approximate location, with a map or maps duly certified, was filed with the Secretary of the Interior at his office in Washington. Whereupon said Secretary, in accordance with the provisions of the Government grant to the said company, ordered the withdrawal from sale, preemption, homestead, and other disposal of the odd-numbered sections for twenty miles on either side of the location of said road as filed in the States of Wisconsin, Minnesota, and

267 Oregon, and in the Territory of Washington as far north as Seattle, omitting the Territories of Dakota, Montana, Idaho, and the portion of Washington north of Seattle.

The said railroad company having by recent surveys and examinations attained to a more correct knowledge of the country, and finding that the location of their road filed by them, as above stated, is not adapted throughout in the best manner to the ground, desire to amend their said approximate location by substituting therefor a line or lines better adapted, it is believed, to the purposes of the company and the public, and in consequence of the following amendments to and changes in the location referred to have been made and approved by the board of directors of said railroad company, as appears on the records of said company, viz:

Commencing at a point in the location, as filed in the State of Minnesota, one and one-half ($1\frac{1}{2}$) miles south of the northwest corner of township forty-eight (48), range sixteen (16), in Carleton County; thence on a direct course westwardly through said Carleton and Itasca counties to the northwest corner of township one hundred and thirty-five (135), range twenty-nine (29) west, a distance of about ninety-six (96) miles.

Thence on a due west course following the line of the township, numbered one hundred and thirty-five (135) and one hundred and thirty-six (136) through Cass and Wadena counties to the southwest corner of township one hundred and thirty-six (136), range thirty-nine (39) west, in Ottertail County, a distance of about sixty (60) miles. Thence in a

268 direct course northwestwardly through Ottertail, Becker, Clay, and Polk counties to a point in the latter county where the north line of townships numbered one hundred and forty-four (144)

meets the Red River at the western boundary of Minnesota, a distance of about eighty-one (81) miles.

The location as filed of the line of the Northern Pacific Railroad from the point above-named, one and one-half miles south of the northwest corner of township forty-eight (48), range sixteen (16) west, in Carleton County, Minnesota, to the Red River, near Georgetown, is hereby withdrawn and the above-described line substituted instead.

The line withdrawn and the line substituted are represented on the accompanying map, entitled "Map exhibiting amendment of line of location of Northern Pacific Railroad in Minnesota. October, 1870."

EDWIN F. JOHNSON,
Engineer in Chief N. Pacific R. R.

STATE OF NEW YORK,
City and County of New York, ss:

Subscribed and sworn to before me this sixth day of October, 1870.

[SEAL.]

W. N. GOODARD,
Notary Public, Co. of N. Y.

It is hereby certified that in pursuance of the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast, by the northern route," and the several acts amendatory thereto:

269 The Northern Pacific Railroad Company, organized in accordance with said act, did, on the second day of July, ult., approve of an approximate location of the line of their road, and caused the same to be filed in the office of the Secretary of the Interior on the thirtieth of said July; since which date the said company, from information derived from surveys made under their direction, and from information which they believe to be reliable, otherwise obtained, have deemed it their duty to vary the approximate location of the line of their road in the places and to the extent specified above; which changes or variations were approved by a vote of the directors of the said company on the 29th day of Sept., as by the record of the said company duly appears.

New York City, Oct. 1st, 1870.

J. GREGORY SMITH, *President.*
EDWIN F. JOHNSON,
Eng. in Chf. N. Pac. R. R.

Certificate of true copy of original papers on file in Department of Interior, dated August 9th, 1894, under seal of Department, and signed by Edwin A. Bowen, Acting Commissioner of the General Land Office, attached.

Mr. PAYSON. We next offer letter dated October 7th, 1870, from Edwin F. Johnson to Hon. J. D. Cox, and certificate of William H. Sims, Acting Secretary of the Interior, dated August 7th, 1894.

(Received and marked "Defendants' Exhibit G.")

270

Defendants' Exhibit G.

NORTHERN PACIFIC RAILROAD COMPANY,
ENGINEER'S OFFICE,
120 Broadway, New York, October 7th, 1870.

Hon. J. D. COX, *Secretary of the Interior.*

DEAR SIR: I am directed by the president of the Northern Pacific Railroad Company to forward to your office the enclosed certificate of location of the Northern Pacific R. R. in Minnesota. The certificate enclosed is an amendment of the line of the company's road in Minnesota, and is a substitute in part of the location filed in your office on the 30th of July last, as will appear on examination.

Yours, very respectfully,

EDWIN F. JOHNSON,
Eng. in Chf. N. Pacific R. R.

Please inform me when the order for the above change is issued.

Certificate of true copy of original letter on file in Department of the Interior, dated August 7th, 1894, under seal of Department, signed by William H. Sims, Acting Secretary of the Interior, attached.

MR. PAYSON. We next offer a letter dated October 12th, 1870, from Hon J. D. Cox to Edwin F. Johnson, under certificate of William H. Sims, Acting Secretary of the Interior, dated August 7th, 1894.

(Received and marked "Defendants' Exhibit H.")

271

Defendants' Exhibit H.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 12th, 1870.

SIR: I have received your letter of the 7th inst., and the accompanying affidavit and map. The latter you ask to have substituted for so much of the map heretofore filed as shows the designated route of the Northern Pacific Railroad through Minnesota, and that the withdrawal in that State may be made to conform to the route shown on this map.

In reply, I have to state that I have this day sent the map and affidavit to the Commissioner of the General Land Office, with directions to have the withdrawal made to conform to the line shown on this map. The route designated on the map is all within the limits of the withdrawal heretofore made, and as a change of the lines of withdrawal causes much trouble and inconvenience, not only to the General Land and the local offices, but to settlers, I hope the company will be able to avoid the necessity of any further changes, except upon the final definite location of the route.

Very respectfully, your obedient servant,

J. D. COX, *Secretary.*

EDWIN F. JOHNSON, Esq.,
Engr. in Chf. N. Pac. R. R. Co., 120 Broadway, New York.

272 Certificate of true copy of original letter of record in Department of Interior, dated August 7th, 1894, under seal of Department, and signed by William H. Sims, Acting Secretary of the Interior, attached.

Mr. PAYSON. We next offer letter of February 16th, 1872, from J. Gregory Smith to Hon. C. Delano, Secretary of the Interior, under certificate of William H. Sims, Acting Secretary of the Interior, of date August 7th, 1894.

(Received and marked "Defendants' Exhibit I.")

Defendants' Exhibit I.

NORTHERN PACIFIC RAILROAD COMPANY,
PRESIDENT'S OFFICE,
120 Broadway, New York, Feb. 16th, 1872.

Hon. C. DELANO, *Secretary of the Interior, Washington, D. C.*

DEAR SIR: I have the honor to transmit herewith a map of the preliminary line of road of this company from the Red River of the North to the Columbia, at the mouth of the Walla Walla River, and to request that the lands pertaining to said route may be withdrawn from settlement and sale.

I have the honor to be, very respectfully, your obdt. servant,
J. GREGORY SMITH, *President.*

Certificate of true copy of original on file in Department, dated August 7th, 1894, under seal of Department and signed by William H. Sims, Acting Secretary of the Interior, attached.

273 Mr. PAYSON. We now offer certified copy of letters under certificate of Edward A. Bowen, Acting Commissioner of the General Land Office, certificate dated August 9th, 1894.

(Received and marked "Defendants' Exhibit K.")

Defendants' Exhibit K.

DEPARTMENT OF THE INTERIOR, RAILROADS,
Washington, D. C., 21st Feby., 1872.

SIR: I transmit herewith for appropriate action a map of the preliminary route of the Northern Pacific Railroad (received yesterday, with letter of 16th inst., from J. Gregory Smith, esq., pres. of the co.) from the crossing of the Red River of the North at Fargo, in Dakota, to a point opposite the mouth of the Walla Walla River, Washington Territory, a distance of about 1,448 miles.

Very respectfully, your ob't servant,

C. DELANO, *Secretary.*

P. S.—Before you take final action please confer with the Department.

C. DELANO, *Secy.*

Hon. WILLIS DRUMMOND, *Commr. G. L. O.*

(Endorsed:) 1 82649. Hon. Sec. of the Interior. Feby. 21, 1872. Map of the preliminary route of the N. P. R. R. &c. No. ans. req., lands withdrawn. Feby. 22.

ENGINEER'S DEPARTMENT,
New York, February 16th, 1872.

NORTHERN PACIFIC R. R.:

274 I certify that the line of railroad as laid down on this map shows the general route of the "Northern Pacific Railroad" from our locations and surveys, made personally or by my assistants, up to this date, from the crossing of the "Red River of the North," in Dakota Territory, to a point opposite the mouth of the Walla Walla River, comprising about fourteen hundred and forty-eight miles, and that this line indicates, as nearly as it is now practicable to show it, the route that we anticipate will be finally accepted for that portion of the main line of the Northern Pacific Railroad.

W. MILNOR ROBERTS,
Chief Engr. Northern Pacific Railroad.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
March 30, 1872.

REGISTER AND RECEIVER, *Pembina, Dakota Ter.*

GENTLEMEN: I transmit herewith diagram showing the designated route of the Northern Pacific Railroad, under act of July 2nd, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, preemption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles, as designated on this map.

You will also increase in price to \$2.50 per acre the even-numbered sections within those limits, and dispose of them at that ratability and under the preemption and homestead laws only, no private entry
275 of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge, without delay, the time of its receipt.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

Receipt ack. April 22, '72, "9" 97, 526.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 15th, 1872.

REGISTER AND RECEIVER, *Lewiston, Idaho Ter.*

GENTLEMEN: I transmit herewith diagrams showing the designated route of the Northern Pacific Railroad, under act of July 2d, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, preemption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public land falling within the limits of 40 miles, as designated on this map.

You will also increase in price to \$2.50 per acre the even-numbered sections within those limits, and dispose of them at that ratability and

under the preemption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

276 This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

Receipt ack. April 29, '72, "1," 96, 745.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 22, 1872.

REGISTER & RECEIVER, *Helena, M. T.*

GENTLEMEN: I transmit herewith diagram showing the designated route of the Northern Pacific Railroad, under the act of July 2d, 1864, and by direction of the Secretary of the Interior you are hereby directed to withhold from sale or location, preemption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles, as designated on this map.

You will also increase in price to \$2.50 per acre the even-numbered sections within these limits, and dispose of them at that ratability and under the preemption laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

Receipt ackd. May 6th, 1872, 1, 97, 123.

277 Certificate of true copy of original papers and letters on file in Department of the Interior, dated August 9th, 1884, under seal of Department, and signed by Edward A. Bowen, Acting Commissioner of the General Land Office, attached.

MR. PAYSON. We next offer letter dated February 21st, 1872, signed C. Delano, Secretary, addressed to J. Gregory Smith, under certificate of William H. Sims, Acting Secretary of the Interior, of date August 7th, 1894.

(Received and marked "Defendants' Exhibit L.")

Defendants' Exhibit L.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., 21st Feb.

SIR: I am in receipt of your letter of the 16th instant, and the accompanying map of the preliminary route of the Northern Pacific Railroad from the crossing of the Red River of the North, at Fargo, in Dakota, to

a point opposite the mouth of the Walla Walla River, Washington Territory, a distance of about 1,448 miles, and have to inform you that said map has been forwarded to the Commissioner of the General Land Office.

Very respectfully,
J. GREGORY SMITH, Esq.,
Pres. of the Company, 120 Broadway, N. York.

C. DELANO, *Secretary.*

Certificate of true copy of original record in Department of Interior, dated August 7th, 1894, under seal of Department, and signed by William H. Sims, Acting Secretary of the Interior, attached.

278 Mr. PAYSON. We next offer certified copy of Senate Executive Document Number 120, second session 46th Congress.

(Received and marked "Defendants' Exhibit M." The same is printed and too long to be set forth.)

Mr. PAYSON. We next offer certified copy of public document, the first page of which is entitled "Statements showing land grants made by Congress to aid in the construction of railroads, and so forth," offering the title-page and pages 14 and 15, and the certificate thereto, as evidence here.

(Received and marked "Defendants' Exhibit N.")

Mr. PAYSON. I next offer post-route map of the States of Oregon and Washington, prepared by the Postmaster-General of the United States, Wilson S. Bissell.

(Received and marked "Defendants' Exhibit O.")

Mr. PAYSON. I also offer official map entitled "Department of the Interior, General Land Office, the Honorable Thomas H. Carter, Commissioner of the State of Washington for 1891."

(Received and marked "Defendants' Exhibit P.")

It was thereupon admitted between the parties that the line of road of the Northern Pacific Railroad Company as shown upon map marked "Defendants' Exhibit P" from the point Ainsworth to Tacoma, commencing at Pasco, by way of North Yakima, Swamp Creek, Eagle Gorge, and South Prairie, to Tacoma, has been constructed and is in operation by the Northern Pacific Railroad Company.

279 GEORGE H. ANDREWS, sworn on part of the defendants:

Direct examination. Questions by Mr. FENTON:

Mr. Andrews, what official position do you sustain to the Oregon and California Railroad Company?

A. Secretary and acting land agent.

Q. For how long have you been acting as such?

A. Since 1884.

Q. In whose custody are the books containing the contracts of sale of lands of the Oregon & California Railroad Company granted to it by the act of Congress of July 25th, 1866?

A. Mine.

Q. Examine Exhibit A attached to the answer of the defendant' filed in this suit June 25th, 1894, and state what that exhibit shows, and whether or not it correctly shows the sales of land made on behalf of the Oregon & California Railroad Company as belonging to this grant to

them to the limits involved in this suit, if you know. Please state what it shows.

A. It shows the date of the sales of the lands mentioned in the schedule, and a description of the lands.

Mr. PAYSON. What is the name of it?

Mr. FENTON. It does not give it. There is much within the overlapping limits of the Northern Pacific Railroad Company and the Oregon & California Railroad Company to be ascertained by the Government, as we claim in this suit.

The WITNESS. Yes, sir; claimed by the Government in this suit; in this bill of complaint—the lands mentioned in this bill of complaint.

280 Q. Does this Exhibit A show the date respectively note the acreage respectively, and the description of the acreage of all the lands sold by the Oregon & California Railroad Company that are involved in this suit?

A. It does.

Q. From what source of information did you obtain the data stated in this exhibit?

A. From personal knowledge and examination of the books; from the books of the company and from the records of sales.

Q. You have verified it with the books of the company and know it accurately states the condition of the same?

A. Yes, sir.

Q. Examine the paper now shown you, purporting to be map No. 1 of western Oregon, showing the lands of the Oregon & California Railroad Company, and state what the same is and what the lines, if any, indicate. The claimed limits of the Northern Pacific Railroad Company as overlapping the grant of the Oregon & California Railroad Company. Explain the map fully. State first what it is.

A. This is a map published by the Oregon & California Railroad Company. The line shaded blue—I presume that can be called blue—shows the twenty-mile limits of the grant to the Oregon & California Railroad Company. The line shaded yellow shows the thirty-mile limit of the grant to the Oregon & California Railroad Company.

Q. What is it that shows the so-called overlapping of the Northern Pacific Railroad Company's grant?

A. The red line.

281 Q. At right angles to these?

A. Practically right angles—by slightly shaded reds with the words "N. P. R. R."

Q. Were those made by you?

A. No.

Q. Under your direction?

A. Yes, sir; under my direction, in the clerk's office.

Q. Where is the forty-mile limit? How is that shown?

A. That is shown by the green line.

Q. In ink or in pencil?

A. Yes, sir; marked "Forty mile, N. P. R. R."

Q. What do the red inks and squares show, as located on this map within the limits of the Oregon & California Railroad Company's grant, both twenty and thirty miles?

A. The patented lands.

Q. Were those sections and parts of sections verified by an examination of the patents, respectively, and put by you, or under your direction, on this map?

A. Under my direction.

Q. And were they verified with the patent?

A. Yes, sir; they were verified.

Q. Now, you may state, Mr. Andrews, from your knowledge of the topography of the country described upon this map, whether or not it is an accurate description of it, the location of the city of Portland, the Columbia River on the Oregon side, the Willamette River, the line of the Oregon & California Railroad Company, and the various streams, sections, townships, and ridges indicated upon the map—whether it is an accurate map.

A. It is considered a very accurate map—as accurate as it can be made.

282 Q. Are you acquainted with the location of Portland?

A. Yes, sir.

Q. And you see what indicates the name Portland on the map. It also locates the Columbia River—and from your knowledge what do you say as to its being accurate?

A. It is quite accurate—the location of the Columbia River and Portland. It is the mountain streams that probably might not be accurate running through the sections.

Q. Where is Vancouver, as indicated on this map?

A. Northeast from Portland.

Q. About how far?

A. About six or seven miles.

Q. On the north side of the Columbia River?

A. Yes, sir.

Mr. FENTON. We now offer the map as part of the witness' deposition and testimony, and ask to have the same filed as Exhibit Q.

(Received and marked "Defendants' Exhibit Q.")

Mr. GEARIN. I suppose our reservation as to the relevancy and competency of all this testimony gets in our objection?

Mr. PAYSON. Why, certainly.

Mr. FENTON. I think this will probably close our case, but we may want to introduce some further testimony.

Mr. GEARIN. All right.

(Endorsed:) No. 1982. United States circuit court, district
283 of Oregon. The United States vs. The Oregon & California
R. R. Co. et al. Testimony taken before Mr. F. S. Lafferty,
examiner. Filed Dec. 20, 1894. J. A. Sladen, clerk.

M. C. P.

Defendants' Exhibit B.

A. M.
E. H. H.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,

Washington, D. C., Aug. 7, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

WM. H. SIMS,
Acting Secretary of the Interior.

Department of the Interior, Aug. 5, 1870.]

NORTHERN PACIFIC RAILROAD COMPANY,
ENGINEER'S OFFICE,
120 Broadway, New York, Aug. 4, 1870.

Hon. J. D. COX, *Sec'y of Interior.*

DEAR SIR: From information received from my assistants in Montana and Idaho since my return here from Washington, it is probable the Northern Pacific Railroad Company may wish to vary the location of that portion of their line situated between the mouth of Boulder Creek on Jefferson River in Montana and the Columbia River.

284 There is reason to fear that the valley of the Salmon River may be found impracticable, in which case the company will be compelled to take the next valley to the north of it—the Clearwater.

The president of our company is absent for some days in Minnesota, and I desire you not to take any action on the portion of the route named until he returns or I can communicate with him.

Yours, very respectfully,

EDWIN F. JOHNSON,
Engr. in Chief, N. Pacific R. R.

(Endorsed:) U. S. vs. O. & C. R. R. Co. Deft. Ex. B. Dec. 12, '94.
F. S. Lafferty, special exm. Filed Dec. 13, 1894. J. A. Sladen, clerk.

F.
H. W. H.

Defendants' Exhibit C.

W. J. M.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,
Washington, D. C., Aug. 9, 1894.

I, Edw. A. Bowers, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of resolution of board of directors of the Northern Pacific Railroad Company of July 8, 1870, and certified copy of the proceedings of board of directors of said company of Oct. 26, 1870, being Exhibits B and C in the records of the case of Charles Cole vs. N. R. R. Co., are true and literal exemplifications of the original papers on file in this office.

285 In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

EDW. A. BOWERS,
Acting Commissioner of the General Land Office.

Exhibit B. On Mr. Fargo's motion it was resolved: That the president cause a preliminary location, with a map of the main road of the Northern Pacific Railroad Company, commencing at Whatcom, on Puget Sound; thence running southerly on the easterly side of the said Sound

to Portland, in Oregon, and from the point where the said road crosses the Columbia River, and on the north side thereof and by the valley of the said river to the mouth of the Snake River, to be filed in the office of the Secretary of the Department of the Interior at Washington at as early a day as practicable. Also to cause a like preliminary location, with a map of the main line from the point on the Red River where the said road may cross the said river; running thence to the Missouri River at the point of intersection of the Yellowstone with the Missouri, and thence up the valley of the Yellowstone to a point in the Rocky Mountains, which shall be common to a line to be run either down the valley of the Salmon River or the Clearwater River, and to file said map with the Secretary of the Interior at Washington.

I, George H. Earl, secretary of the Northern Pacific Railroad Company, hereby certify that the foregoing is a true copy of a resolution adopted by the executive committee of the board of directors of said company on July 8, 1870, as appears in the records of the proceedings of said company.

286 In witness whereof I have hereunto set my hand and the seal of said company this 2d day of May, 1893.

GEO. H. EARL,
Secretary Northern Pacific R. R. Co.

Exhibit C (continued).

Meeting of October 26, 1870.

Present, Mess. Smith, Rice, Fargo, Felton, Wright.

The president presented and read the following statement of the transactions of the company since the last meeting of the board of directors:

"Location of the line: In July last a map was prepared showing a located line of our road from Montreal River on Lake Superior to a point in Washington Territory opposite the mouth of the Walla Walla River. The line was thus laid down on the map as an approximate line only, and with the approbation of the Secretary of the Interior, and with the understanding that, as the located line of our road was made from actual surveys, the company might have the privilege of changing the line so as to conform to the actual location, and hold the lands granted according to such final survey.

"With this understanding, the map with the line above described traced upon it was filed in the Department of the Interior, and the request made that the lands granted should be withdrawn by the Department. Subsequent to the filing of the map, and before any action was taken thereon by the Department, the engineer in chief, having received from the engineers in the field in the valley of the Salmon River intelligence that that route proved impracticable for a road, owing to its
287 deep canons, notified the Secretary of the Interior that so much of said line in Montana and Idaho as pertained to the Salmon River route was withdrawn, and requesting no action by the Department thereon. Notice was afterwards received by me from the Secretary of the Interior that our map was received and filed, and that the lands to the extent of twenty sections per mile in Minnesota and Oregon and Washington Territory were withdrawn up to Steilacoom, but that the

Department objected to withdrawing lands to the boundary line. Afterwards, in a letter, the Secretary consents to withdraw the lands to Seattle, to the extent of twenty sections to the mile."

I, George H. Earl, secretary of the Northern Pacific Railroad Company, hereby certify that the foregoing is a true copy of an extract from the record of the proceedings of the executive committee of the board of directors of said company, at a meeting thereof held on the 26th day of October, 1870.

In witness whereof I have hereunto set my hand and the official seal of said company this 2d day of May, 1893.

[SEAL.]

GEO. H. EARL,

Secretary Northern Pacific R. R. Co.

(Endorsed:) U. S. vs. O. & C. R. R. Co. Defts. Ex. C. Dec. 12, '94. F. S. Lafferty, special examiner. Filed Dec. 13, 1894. J. A. Sladen, clerk.

288 M. C. P.

Defendants' Exhibit D.

A. M.

E. H. H.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,

Washington, D. C., Aug. 7, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original as it appears of record in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

WM. H. SIMS,

Acting Secretary of the Interior.

[E. F. JOHNSON, B. 3, p. 169, Nor. Pac. R. R.]

DEPARTMENT OF THE INTERIOR,

Washington, D. C., August 5th, 1870.

SIR: I have received your letters of the 2nd and 4th instant, the first relating to the legislation as to the main line and branch of the Northern Pacific Railroad, and the second stating it may be necessary to change the route of the road in Idaho from the valley of the Salmon River to that of the Clearwater, and asking suspension of action on that portion of the map until you can advise with the president of the company.

289 In reply, I state that I see no objection to a compliance with your request, and action will be accordingly suspended.

Very respectfully, your obedient servant,

J. D. COX, *Secretary.*

EDWIN F. JOHNSON,

Engr. in Ch'f. N. P. R. R. Co.,

120 Broadway, New York.

(Endorsed:) U. S. v. O. & C. R. R. Co. Defts. Ex. D. Dec. 12, '94. F. S. Lafferty, special exr. Filed Dec. 13, 1894. J. A. Sladen, clerk.

18747—10

F.
H. W. H.

Defendants' Exhibit E.

W. J. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Aug. 9, 1894.

I, Edw. A. Bowers, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of affidavit of J. Gregory Smith, formerly president of the Northern Pacific Railroad Company, dated May 20, 1890, and marked "Exhibit E" in the record of the case of R. E. Spicer et al. vs. N. P. R. R. Company, is a true and literal exemplification of the original paper on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

EDW. A. BOWERS,
Acting Commissioner of the General Land Office.

290

Exhibit E.

STATE OF VERMONT,

County of Franklin, ss:

J. Gregory Smith, being duly sworn, deposes and says that he is a resident of the State of Vermont; that during 1870, 1871, and 1872 he was president of the Northern Pacific Railroad Company, and as such had personal supervision and charge of arranging for and filing with the Secretary of the Interior the maps of the Northern Pacific Railroad; that the map of said road, filed August 13, 1870, was filed with the Secretary of the Interior with the express understanding between the said Secretary and the Northern Pacific Railroad Company that the line designated upon said map was an approximate line only of the map of the general route, and that the same might be changed thereafter, providing the company ascertained from actual survey or otherwise that the route marked on said map was impracticable; that the company, after the making of such arrangements and filing said map, did find the route designated thereon impracticable, and before the Secretary of the Interior had acted thereon, and before the approval of said map, and in pursuance of said agreement and arrangements entered into as aforesaid, the company notified the Secretary of the Interior of the impracticability of said route and of its withdrawal of said map as to so much of said line as was located in Western Montana, Idaho, and to the Columbia

291 River in Washington; that at the time of filing of said map it was distinctly understood, as aforesaid, that if the company found the said route, or any portion of it, impracticable, the company might withdraw said preliminary map and file a map of general route, and that in pursuance of said agreement and understanding the Northern Pacific Railroad Company did, on the 21st day of February, 1872, file its map of general route, and the then Secretary of the Interior, in pursuance of the agreement and understanding aforesaid, and under the authority then invested in him, did receive for filing and did approve said map so filed on the 21st day of February, 1872; and deponent further says that on the 26th day of October, 1870, as president of the Northern

Pacific Railroad Company, he made to said company a report in the words and figures following, to wit:

"In July last a map was prepared showing a located line of our road from Montreal River, on Lake Superior, to a point in Washington Territory opposite the mouth of the Walla Walla River. The line was thus laid down on the map as an approximate line only, and with the approbation of the Secretary of the Interior, and with the understanding that as the located line of our road was made from actual surveys the company might have the privilege of changing the line so as to conform to the actual location and hold the lands granted according to such final survey. With this understanding, the map with the line above described traced upon it was filed in the Department of the Interior, and the request made that the lands granted should be withdrawn by the Department. Subsequent to the filing of the map, and before any action was taken thereon by the Department, the engineer in chief, having received from 292 the engineers in the field in the valley of the Salmon River intelligence that that route proved impracticable for a road owing to its deep canons, notified the Secretary of the Interior that so much of said line in Montana and Idaho as pertained to the Salmon River route was withdrawn, and requesting no action by the Department thereon. Notice was afterwards received by me from the Secretary of the Interior that our map was received and filed, and that the lands to the extent of 20 sections per mile in Minnesota and Oregon and Washington Territory were withdrawn up to Steilacoom, but that the Department objected to withdrawing lands to the boundary line. Afterwards, in a letter, the Secretary consents to withdraw the lands to Seattle to the extent of 20 sections to the mile."

That the facts set forth in said report are true.

J. GREGORY SMITH.

STATE OF VERMONT,

County of Franklin:

At St. Albans, in said county, on the 20th day of May, A. D. 1890, personally appeared J. Gregory Smith, to me known, who made oath that the foregoing statement by him subscribed was true, according to his best knowledge, information, and belief.

Before me:

[SEAL.]

GEO. T. CHILDS, *Notary Public*.

(Endorsed:) U. S. vs. O. & C. R. R. Co. Defts. Ex. E. Dec. 12, 1894. F. S. Lafferty, special examiner. Filed Dec. 13, 1894. J. A. Shaden, clerk.

293 H. F. H.

Defendants' Exhibit F.

W. J. M.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., Aug. 9, 1894.

J. Edw. A. Bowers, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of letter of Secretary Cox of Oct. 12, 1870, to Commissioner Wilson, copy of affidavit of Chief Engineer Johnson, and copy of certificate of President Smith, officers of

Northern Pacific Railroad Company, and dated respectively Oct. 6 and 1, 1870, are true and literal exemplifications of the original papers on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

EDW. A. BOWERS,

Acting Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., Oct. 12th, 1870.

SIR: I transmit herewith an affidavit of the president and engineer in chief of the Northern Pacific Railroad Company with a map designating the route of said company's road through Minnesota.

The company, as shown by this map, have changed the route of their road in Minnesota.

The withdrawal heretofore ordered you will cause to be made
294 to conform to the route designated on this map, and the lands now withdrawn and not within twenty miles of this route to be restored.

Very respectfully, your obedient servant,

J. D. Cox, *Secretary.*

Hon. JOS. S. WILSON,

Commissioner of the Gen'l Land Office.

(Endorsement :) Letter 1 J 19893. Dept. of the Interior. Secretary. Oct. 12, 1870. Division 1363 transmits aff'd't of the president and engineer in chief of the N. P. R. R. Co. Also map designating the route of said company, and directs that the withdrawal of lands be made to conform with the route designated (R) Minnesota. Immediate. Ref'd to Div. "F." Recd. (G. L. O.) Oct. 13, 1870.

STATE OF NEW YORK,

County of New York, ss:

NEW YORK CITY, *October 1st, 1870.*

Edwin F. Johnson, of the city, county, and State of New York, deposes and says that he is the engineer in chief of the Northern Pacific Railroad Company, and that he has been such engineer in chief since June, 1866.

That during the period above named surveys and explorations have been made on various portions of the route proposed for said road for determining its proper location, and that on the thirtieth day of July last, by direction of the board of directors of said railroad company, a written description of an approximate location, with a map or maps duly certified, was filed with the Secretary of the Interior at his office
295 in Washington. Whereupon said Secretary, in accordance with the provisions of the Government grant to the said company, ordered the withdrawal from sale, preemption, homestead, and other disposal of the odd-numbered sections for twenty miles on either side of the location of said road as filed in the States of Wisconsin, Minnesota,

and Oregon, and in the Territory of Washington as far north as Seattle, omitting the Territories of Dakota, Montana, Idaho, and the portion of Washington north of Seattle.

The said railroad company, having by recent surveys and examinations attained to a more correct knowledge of the country, and finding that the location of their road filed by them, as above stated, is not adapted throughout in the best manner to the ground, desire to amend their said approximate location by substituting therefor a line or lines better adapted, it is believed, to the purposes of the company and the public, and in consequence the following amendments to and changes in the location referred to have been made and approved by the board of directors of said railroad company, as appears on the records of said company, viz:

Commencing at a point in the location, as filed in the State of Minnesota, one and one-half ($1\frac{1}{2}$) miles south of the northeast corner of township forty-eight (48), range sixteen, in Carleton County; thence on a direct course westwardly through said Carleton and Itasca counties to the northwest corner of township one-hundred and thirty-five (135), range twenty-nine west, a distance of about ninety-six (96) miles.

296 Thence on a due west course following the line of the township numbered one hundred and thirty-five (135) and one hundred and thirty-six (136) through Cass and Wadena counties to the southwest corner of township one hundred and thirty-six (136), range thirty-nine (39) west, in Ottertail County, a distance of about sixty (60) miles; thence on a direct course northwestwardly through Ottertail, Becker, Clay, and Polk counties to a point in the latter county where the north line of township numbered one hundred and forty-four (144) meets the Red River at the western boundary of Minnesota, a distance of about eighty-one (81) miles.

The location as filed of the line of the Northern Pacific Railroad from the point above named one and one-half miles south of the northwest corner of township forty-eight (48), range (16) sixteen west, in Carleton County, Minnesota, to the Red River near Georgetown, is hereby withdrawn and the above-described line substituted instead.

The line withdrawn and the line substituted are represented on the accompanying map, entitled "Map exhibiting amendment of line of location of Northern Pacific Railroad in Minnesota, October, 1870."

EDWIN F. JOHNSON,
Engineer in Chief N. Pac. R. R.

STATE OF NEW YORK,
City and County of New York:

Subscribed and sworn to before me this sixth day of October, 1870.

[SEAL.]

W. N. GOODARD,
Notary Public, Co. of New York.

07 It is hereby certified that in pursuance of the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," and the several amendments thereto.

The Northern Pacific Railroad Company, organized in accordance with said act, did on the second day of July ult. approve of an approximate location of the line of their road, and caused the same to be filed in the office of the Secretary of the Interior on the thirtieth of said July. Since which date the said company, from information derived from surveys made under their direction and from information which they believe to be reliable otherwise obtained, have deemed it their duty to vary the approximate location of the line of their road in the places and to the extent specified above, which changes or variations were approved by a vote of the directors of the said company on the 29 day of Sept. inst., as by the record of said company duly appears.

J. GREGORY SMITH,
President.

EDWIN F. JOHNSON,
Eng. in Chf. N. Pac. R. R.

NEW YORK CITY, Oct. 1st, 1870.

(Endorsed:) U. S. vs. O. & C. R. R. Co. et al. Deft's Ex. F. Dec. 12, '94. F. S. Lafferty, special exr. Filed Dec. 13, 1894. J. A. Sladen, clerk.

298 M. C. P. *Defendants' Exhibit G.* A. M.
E. H. H.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Aug. 7, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the original letter on file in this Department and of its endorsement.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

WM. H. SIMS,
Acting Secretary of the Interior.

Department of the Interior, Oct. 8, 1870.]

NORTHERN PACIFIC RAILROAD COMPANY,
ENGINEER'S OFFICE,
120 Broadway, New York, Oct. 7th, 1870.

Hon. J. D. COX, *Secretary of the Interior.*

DEAR SIR: I am directed by the president of the Northern Pacific Railroad Company to forward to your office the enclosed certificate of location of the Northern Pacific R. R. in Minnesota. The certificate enclosed is an amendment of the line of the company's road in
299 Minnesota, and is a substitute in part of the location filed in your office on the 30th of July last, as will appear on examination.

Yours, very respectfully,

EDWIN F. JOHNSON,
Engr. in Chf. N. Pacific R. R.

* Please inform me when the order for the above change is issued.

* In lead pencil in original.

(Endorsed:) Northern Pac. Department of the Interior. Received Oct. 8th, 1870. Dated Oct. 7th, 1870. From Edwin F. Johnson, eng. in ch. N. Pac. R. R. Co., 120 Broadway, N. Y. Subject: Encloses map amending line of road in Minnesota, with statement of reasons for making the change. Action. Acks. and ordered withdrawal. Oct. 12, 1870. Registered 1-273. Filed. U. S. vs. O. & C. R. R. Co., et al. Defts. Ex. G. Dec. 12, '94. F. S. Lafferty, special exr. Filed Dec. 13, 1894. J. A. Sladen, clerk.

M. C. P.

Defendants' Exhibit H.

A. M.

E. H. H.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Aug. 7, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original as it appears of record in this Department.

In testimony whereof I have hereunto subscribed my name and
300 caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SE'L.]

WM. H. SIMS,

Acting Secretary of the Interior.

E. F. Johnson, B. 3, p. 258. Northern Pacific. Certificate and map.]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 12th, 1870.

SIR: I have received your letter of the 7th inst. and the accompanying affidavit and map. The latter you ask to have substituted for so much of the map heretofore filed as shows the designated route of the Northern Pacific Railroad through Minnesota, and that the withdrawal in that State may be made to conform to the route shown on this map.

In reply I have to state that I have this day sent the map and affidavit to the Commissioner of the General Land Office, with directions to have the withdrawal made to conform to the line shown on this map. The route designated on the map is all within the limits of the withdrawal heretofore made, and as a change of the lines of withdrawal cause much trouble and inconvenience, not only to the General Land and the local offices, but to settlers, I hope the company will be able to avoid the necessity of any further changes, except upon the final definite location of the route.

Very respectfully, your obedient servant,

J. D. COX, *Secretary.*

EDWIN F. JOHNSON, Esq.,

Eng. in Chf. N. Pac. R. R. Co.,
120 Broadway, New York.

301 (Endorsed:) U. S. vs. O. and C. R. R. Co. Defts. Ex. H.
Dec. 12, '94. F. S. Lafferty, special exr. Filed Dec. 13, 1894.
J. A. Sladen, clerk.

M. C. P.

*Defendants' Exhibit I.*A. M.
E. H. H.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Aug. 7, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

WM. H. SIMS,
Secretary of the Interior.

Department Interior, Feb. 20, 1872.]

NORTHERN PACIFIC RAILROAD COMPANY,
PRESIDENT'S OFFICE,
120 Broadway, New York, Feb. 16, 1872.

Hon. C. DELANO,

Secretary of the Interior, Washington, D. C.

DEAR SIR: I have the honor to transmit herewith a map of the preliminary line of road of this company from the Red River of the
302 North to the Columbia, at the mouth of the Walla Walla River, and to request that the lands pertaining to said route may be withdrawn from settlement and sale.

I have the honor to be, very respectfully, your ob'd't serv't,

J. GREGORY SMITH, *President.*

(Endorsed:) U. S. vs. O. & C. R. R. Co. et al. Deft. Ex. I. Dec. 12, '94. F. S. Lafferty, special exr. Filed December 13, 1894. J. A. Sladen, clerk. By G. H. Marsh, deputy.

F.
H. W. H.*Defendants' Exhibit K.*

W. J. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Aug. 9, 1894.

I, Edw. A. Bowers, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of letter of Secretary Delano, of Feb. 21, 1872, to Commissioner Drummond; copy of certificate of W. Milnor Roberts, chief engineer Nor. P. R. R. Company; copy of Acting Com'r's letter of March 30, 1872, to reg. & rec., Pembina, D. Ty.; copy of Act. Com'r's letter of Apr. 15, 1872, to reg. & rec., Lewiston, Idaho Ty., and copy of Com'r's letter of April 22, 1872, to reg. & rec., Helena, Montana Ty., are true and literal exemplifications of the original papers and letters on file in this office.

303 In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

EDW. A. BOWERS,
Acting Commissioner General Land Office.

DEPARTMENT OF THE INTERIOR, RAILROADS,
Washington, D. C., 21st Feby., 1872.

SIR: I transmit herewith, for appropriate action, a map of the preliminary route of the Northern Pacific Railroad (received yesterday, with letter of 16th inst. from J. Gregory Smith, esq., prest. of the co.,) from the crossing of the Red River of the North at Fargo, in Dakota, to a point opposite the mouth of Walla Walla River, Washington Territory, a distance of about 1,448 miles.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

P. S.—Before you take final action please confer with the Department.

C. DELANO, *Secy.*

HON. WILLIS DRUMMOND, *Com. G. L. O.*

(Endorsed:) 1 82649. Hon. Sec. of the Interior. Feby. 21, 1872. Map of the preliminary route of the N. P. R. R. &c. No. ans. req. Lands withdrawn. F. Feb. 22, '72.

ENGINEER DEPARTMENT,
New York, February 16th, 1872.

NORTHERN PACIFIC RAILROAD:

304 I certify that the line of railroad as laid down on this map shows the general route of the "Northern Pacific Railroad" from our locations and surveys made personally or by my assistants, up to this date, from the crossing of the "Red River of the North" in Dakota Territory to a point opposite the mouth of the Walla Walla River, comprising about fourteen hundred and forty-eight miles, and that this line indicates, as nearly as it is now practicable to show it, the route that we anticipate will be finally adopted for that portion of the main line of the Northern Pacific Railroad.

W. MILNOR ROBERTS,
Chief Eng. Northern Pacific Railroad.

Address only the Commissioner of the General Land Office.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
March 30, 1872.

REGISTER & RECEIVER, *Pembina, Dakota Ter.*

GENTLEMEN: I transmit herewith diagram showing the designated route of the Northern Pacific Railroad, under act of July 2nd, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, preemption, or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles, as designated on this map.

You will also increase in price to \$2.50 per acre the even-numbered sections within those limits, and dispose of them at that ratability, and under the preemption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge, without delay, the time of its receipt.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

Receipt ack. April 22, '72. "I," 97, 526.

Address only the Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 15th, 1872.

REGISTER AND RECEIVER,
Lewiston, Idaho Ter.

GENTLEMEN: I transmit herewith diagrams showing the designated route of the Northern Pacific Railroad, under act of July 2d, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, preemption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public land falling within the limits of 40 miles, as designated on this map.

You will also increase in price to \$2.50 per acre the even-numbered sections within those limits, and dispose of them at that ratability, and under the preemption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

306 This order will take effect from the date of its receipt by you and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

Receipt ack. April 29, '72. "I," 96, 745.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 22d, 1872.

REGISTER AND RECEIVER,
Helena, M. T.

GENTLEMEN: I transmit herewith diagram showing the designated route of the Northern Pacific Railroad, under the act of July 2d, 1864, and by direction of the Secretary of the Interior you are hereby directed to withhold from sale or location, preemption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public land falling within the limits of 40 miles, as designated on this map.

You will also increase in price to \$2.50 per acre the even-numbered sections within these limits, and dispose of them at that ratability, and under the preemption laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

Receipt ackd. May 6, 1872. "I," 97, 128.

307 (Endorsed:) U. S. vs. O. & C. R. R. Co. et al., defts. Ex. K.
Dec. 12/94. F. S. Lafferty, special exr. Filed Dec. 13, 1894.
J. A. Sladen, clerk.

M. C. P.

Defendants' Exhibit L.

A. M.
E. H. H.

UNITED STATES OF AMERICA.

(Vignette.)

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Aug. 7, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original as it appears of record in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

WM. H. SIMS,
Acting Secretary of the Interior.

J. Gregory Smith. 8-151. Northern Pacific. Map preliminary route from Red River to Walla Walla.]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Feb. 21st, 1872.

SIR: I am in receipt of your letter of the 16th instant and the accompanying map of the preliminary route of the Northern Pacific Railroad from the crossing of the Red River of the North, at Fargo, in Dakota, to a point opposite the mouth of the Walla Walla River, Washington Territory, a distance of about 1,448 miles, and have to inform you that said map has been sent to the Commissioner of the General Land Office.

Very respectfully,

C. DELANO,
Secretary.

J. GREGORY SMITH, Esq.,

Presd. of the Company, 120 Broadway, N. Y.

(Endorsed:) U. S. vs. O. & C. R. R. Co. Deft. Ex. L. Dec. 12, '94. F. S. Lafferty, special exr. Filed Dec. 13, 1894. J. A. Sladen, clerk.

Defendants' Exhibit M.

No. 3. N. P. R. R. maps. Sen. Ex. Doc. 120, 2/46 Cong. U. S. vs. O. & C. R. R. Co. Defts. Ex. M. Dec. 12, '94. F. S. Lafferty, special exr.

Extract from the Journal of the Senate of the United States, March 15, 1880.]

"The Vice-President laid before the Senate a letter of the Secretary of the Interior, communicating, in answer to a resolution of the Senate

of the 3d ultimo, information concerning the general lines of location of the Northern Pacific Railroad, the changes in said location, the lands withdrawn under the several locations, and the extent to which the rights of settlers have been affected, which was referred to the Committee on Public Land' and ordered to be printed."

I, William R. Cox, Secretary of the Senate of the United States, do hereby certify that the above is a true copy of so much of the
309 Journal of the Senate of March 15, 1880, p. 335, Forty-sixth Congress, second session, as relates to the presentation and reference to the Committee on Public Lands and printing of the letter therein referred to, and the annexed printed document, entitled Senate Ex. Doc. No. 120, Forty-sixth Congress, second session, is the official print of the said letter and accompanying documents, including six maps, as appears in vol. 4 of Senate Documents, 2d session, 46th Congress, Nos. 100 to 180, on file in the library of the Senate.

In witness whereof I have hereunto set my hand and caused the seal of the Senate to be affixed this fourteenth day of November, A. D. 1894.

[SEAL.]

WILLIAM R. COX, *Secretary*.

By H. B. McDONALD,

Asst. Journal Clk. U. S. S.

Senate Ex. Doc. No. 120, 46th Congress, 2d session.]

Letter from the Secretary of the Interior, communicating, in compliance with a resolution of the Senate of February 3, 1880, information concerning the general lines of location of the Northern Pacific Railroad, the changes in said location, the lands withdrawn under the several locations, and the extent to which the rights of settlers have been affected. March 15, 1880, referred to the Committee on Public Lands and ordered to be printed.

310

DEPARTMENT OF THE INTERIOR,

Washington, March 12, 1880.

SIR: In answer to Senate resolution of the 3d ultimo, calling for information concerning the general lines of location of the Northern Pacific Railroad, the changes in said location with the approval of this Department, the average distances between the original and amended lines, the lands withdrawn under the several locations, and the extent to which the rights of settlers have been affected by the changes of location, I have the honor to transmit herewith copy of report on the subject by the Acting Commissioner of the General Land Office, and the accompanying maps.

Very respectfully,

C. SCHURZ, *Secretary*.

THE PRESIDENT OF THE SENATE.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 8, 1880.

SIR: I have the honor to acknowledge the receipt on the 4th ultimo, by reference from the Department, on that day, for report to you thereon, of Senate resolution of the 3d ultimo, as follows:

"Resolved, That the Secretary of the Interior be, and he is hereby, directed to communicate to the Senate the general lines of location of the

311 Northern Pacific Railroad Company, and what changes, if any, have been made by said company in their general line of location and approved by the Department since their organization to the present date, giving the average distance, respectively, between such several lines of location and the extent and general character of such changes; also a statement of the lands withdrawn from settlement in favor of said company under the several locations made, and to what extent such several changes of location have affected the rights of settlers."

The following statement will show the several lines of location as indicated by the maps filed by the company with all the action had thereon. For convenience, the maps and the lines shown by each will be considered in connection with the several separate States and Territories through which they pass or within which they lie.

WISCONSIN.

Map showing the general line of route from the initial point at the mouth of the Montreal River, on Lake Superior, in township 47 north, range 1 west, of 4th principal meridian; thence southwesterly to the southwest corner of township 47 north, range 4 west; thence northwesterly to a point on the west line of the State, in township 48 north, range 15 west. Accepted by the Department August 13, 1870. The odd-numbered sections undisposed of within twenty miles of said line ordered to be withdrawn, and the even-numbered sections within said limits held for disposal at the double minimum price, by letter from this office to registers and receivers dated September 15, 1870. There has never been any definite location of this portion of the line, nor any further action in reference thereto.

312

MINNESOTA.

Map of general line of route from a point on the eastern boundary of the State, in township 48 north, range 16 west, fourth principal meridian; thence in a straight line southwesterly to the northwest corner of township 136 north, range 38 west, fifth principal meridian; thence in a straight line northwesterly to the western boundary of the State in township 142 north, range 48 west. Accepted by the Department August 13, 1870. Odd-numbered sections within 20 miles of said line ordered to be withdrawn by letters to registers and receivers dated September 15, 1870, and even sections increased in price.

Map showing change in general line of route. It shows a line diverging from the foregoing at a point on the west line of township 48 north, range 18 west, fourth principal meridian; thence in a straight line to a point at the northwest corner of township 135 north, range 49 west, fifth principal meridian; thence in a straight line to a point at the northwest corner of township 135 north, range 39 west, and thence in a straight line northwesterly, crossing the former line to the western boundary of the State, in township 144 north, range 48 west. At the northwest corner of township 135 north, range 29 west, this changed line is about six miles south, and at the western boundary of the State it is about 15 miles north from the former line. Accepted by the Department October 12, 1870. The withdrawal was, by letters of November 7, 1870, to

registers and receivers, ordered to conform to the changed line, the new lands affected included, and the proper lands restored to settlement and entry.

313 Map showing constructed line from a junction with the Lake Superior and Mississippi Railroad in township 48 north, range 16 west, fourth principal meridian, and running westerly through townships 48 north, ranges 17, 18, 19, and part of 20 west, part of 49 north, 20 west, 48 north, 21, 22, 23, and 24 west, 47 north, 25, 26, and 27 west, 46 north, 28 and 29 west, and 45 north, 30 west, fourth principal meridian, to Brainerd; thence through townships 133 north, 28, 29, 30, 31, 32, and 33 west, 134 north, 34, 35, and 36 west, 135 north, 37 west, 136 north, 38 and 39 west, 137 north, 39 west, 138 north, 40 west, 139 north, 40, 41, 42, 43, 44, 45, 46, 47, and 48 west, of fifth principal meridian, to the western boundary of the State. Received with Department letter of November 21, 1871. It was accepted as the definite location of the road and treated accordingly, no previous evidence of such location having been presented. By letters to registers and receivers of December 12th, 16, and 26, the odd sections within 40 miles of said line were withdrawn from settlement and entry, and the even sections within 20 miles thereof held as double minimum, the even sections in the 20 miles limits of the former withdrawal falling without like limits by this line being reduced to minimum. This line of definite location is distant from the general line of October 12, 1880, about 6 miles on an average, considering the whole line through Minnesota.

Maps of the constructed road, with profile thereof, approved by the President of the United States, were received with the Secretary's letter of January 6, 1873.

314 From the eastern boundary of the State to the initial point of the constructed road, as described, the line has not been definitely located, so far as I am advised.

DAKOTA.

Map of general line of route from a point west of and opposite township 142 north, range 48 west, Minnesota, on the eastern boundary of the Territory, in a straight line, northwesterly, to Minniwaukan or Devil's Lake; thence in a straight line southwesterly to the western boundary of the Territory at a point about 20 miles east of the Yellowstone River. Received with Secretary's letter of August 13, 1870. This portion of the line shown on said maps was not accepted by the Department, and no action was taken concerning it.

Map of general line of route from Fargo, nearly due west, to the western boundary of the Territory, accepted by the Department February 21, 1872. Withdrawal of odd sections within 40 miles of said line ordered by letters to registers and receivers dated March 30, 1872, and even sections increased in price to \$2.50 per acre.

Map of definite location of the line of route, showing the line as constructed from Fargo to the Missouri River, opposite Fort Lincoln. Accepted by the Department May 26, 1873. It shows a line south of, but at no point more than 6 miles distant from, the line of 1872, as last above described. A withdrawal was ordered on this line June 11, 1873,

of odd sections within 50 miles, the even sections within 40 miles held as double minimum, and the even sections within 50 miles, which were in the 40 miles limits, by the line of 1872, reduced to minimum.

315 Map of constructed line from Fargo to the Missouri River approved by the President of the United States. Received with letter from the Secretary of the Interior, dated December 2, 1873. The line shown agrees with that of the definite location.

From the Missouri River to the western boundary of the Territory there has been no definite location of the line, so far as any evidence has been filed.

MONTANA.

Map of general lines of route from a point on the eastern boundary of the Territory about 20 miles east of the Yellowstone River, which river it crosses at a point about 20 miles westerly from said boundary; thence on the north side of said river and along its general course, crossing it at a point about 20 miles east of the Bighorn River; thence along the south side of the Yellowstone to a point about 20 miles east of Fort Ellis; thence to Fort Ellis, and thence, in a general southwesterly course, to the western boundary of the Territory. This line was not accepted by the Department, and no action was taken concerning it. Received with Secretary's letter of August 13, 1870.

Map of general line of route from a point on the eastern boundary of the Territory, about three miles north of Glendwes Creek, and along that creek to the Yellowstone River; thence along the south side of the Yellowstone, crossing it at the junction of the Powder River; thence along the north side of the Yellowstone to a point about 20 miles east of

316 Fort Ellis; thence to Fort Ellis, and thence, in a general north and west course, to the western boundary of the Territory at a point east from Lake Pend d'Oreille in Idaho. Accepted by the Department February 21, 1872. The odd sections within 40 miles of this line

were ordered to be withdrawn by letter, dated April 22, 1872, the even sections within the same limits being increased to the double minimum price. There has been no definite location of this portion of the line, nor any change in the withdrawal.

IDAHO.

Map of general line of route, main line, from a point on the eastern boundary of the Territory, about twenty miles northeasterly from the mouth of the Beaver River, southwesterly to the mouth of said river; thence, following the general course of the Salmon River to a point about 15 miles easterly from the junction thereof with the Snake or Lewis River; thence northwesterly about 30 miles to the Snake or Lewis River, the western boundary of the Territory. Received with Secretary's letter of August 13, 1870. The line was not accepted by the Department, and no action was taken concerning it.

Map of general line of route, main line, from a point on the eastern boundary of the Territory, due east from Laked Pend d'Oreille; thence north and west around said lake, and thence southerly and westerly to a point on the western boundary of the Territory west of said lake.

Accepted by the Department February 21, 1872. Odd sections within 40 miles of said line withdrawn by letter of April 15, 1872, and even sections increased to double minimum price.

317 Map of proposed branch line, and showing general line thereof from Lake Pend d'Oreille westerly along the general course of Clark's Fork of the Columbia River, and to the western boundary of the Territory at a point about 20 miles south of where said fork crosses said boundary. Accepted by the Department August 20, 1873. Odd sections withdrawn by letter of November 1, 1873, within 40 miles of said branch line, not previously withdrawn from the main line, and the proper lands in even sections increased in price. This branch line has been abandoned and a branch beginning in Washington Territory substituted, as will be seen further on. By letter of October 28, 1876, the above withdrawals were amended or modified, and the proper lands restored to settlement and entry and reduced to the minimum price.

WASHINGTON TERRITORY.

Map of general line of route, main line, from a point on the eastern boundary of the Territory and about 10 miles north from the Oregon line; thence in a straight line and slightly southwest to Wallula, on the Columbia River; also map of general route, main line, from the mouth of the Walla Walla River, via the Columbia River, on the north side thereof, to a point in township 7 north, range 2 west; thence northerly to township 17 north, 2 west; thence northeasterly to township 21 north, 4 east; thence north to township 27 north, 4 east; thence northeasterly to township 30 north, 5 east; thence northwesterly to township 37 north, 3 east; and thence northwesterly to township 40 north, 1 east, the north boundary of the Territory. Accepted by the Department August 13, 1870. September 20, 1870, registers and receivers in Washington Territory and Oregon were directed to withdraw the lands within 20 miles of said line, i. e., the odd sections, and to hold the even sections in said limits at the double minimum price. November 21, 1870, there was ordered an additional withdrawal, to include the odd sections within 40 miles of said line in Washington Territory as far north as the north line of township 25 north. By telegrams dated February 9 and 10 and letters dated February 14, 1872, there were ordered withdrawn the odd sections within 40 miles from the south lines of townships 26 north to Whatcom, in the Territory, and all the odd sections within 40 miles in Oregon, the even sections in said limits throughout being increased in price.

Map changing the general line of route, main line, from eastern boundary of the Territory to the north of the Walla Walla River accepted by the Department February 21, 1872, commencing on the eastern boundary a little south of west from Lake Pend d'Oreille, in Idaho; thence southerly and westerly to the mouth of Lewis Fork of the Columbia, or Snake, River; thence crossing the Columbia River, and along the west side thereof southerly to the mouth of the Walla Walla River, where it joins the old or first line. By letters dated March 30, 1872, and April 15, 1872, the lands theretofore withdrawn, falling outside from 40 miles of this new line, were restored, and the new lands

falling within said limits were withdrawn or increased in price, according as same were odd or even sections. The point at which this new line enters the Territory is about 108 miles north of the point at which the line of 1870 crossed the eastern boundary, and the average distance between the two lines is something more than 50 miles.

Map of constructed main line from Kalama northeasterly 65 miles, accepted by the President of the United States, received with letter from the Department dated September 12, 1873; and map of constructed main line from terminus of the foregoing to Tacoma, 40.1 miles, accepted by the President, received with letter from the Department dated May 14, 1874. By letters of January 21 and November 12, 1874, the line having been thus definitely located from Kalama to Tacoma, registers and receivers in Washington Territory and Oregon were instructed to withdraw the odd sections within 50 miles thereof. The even sections between the 40 and 50 miles were not affected in any way. The line as constructed is, as nearly as might be, on the general line accepted in 1870.

Map of general route, branch line, from a point on the eastern boundary west from Lake Pend d'Oreille, in Idaho; thence westerly and southerly to the Columbia River, which it crosses at a point which, if surveyed, would, approximately, in township 20 north, range 22 east; thence northerly and westerly to a point which, surveyed, would be in township 32 north, 10 east; and thence southerly and westerly to Tacoma, in township 21 north, 3 east. Accepted by the Department August 20, 1873. Withdrawal ordered, in 40 miles limits, October 6 and November 1, 1873; certain lands north of Tacoma theretofore withdrawn on account of main line being restored.

Map of amended general route, branch line, accepted by the Department November 24, 1876. Beginning at the main line at the west side of the Columbia River and at the south side of the Yakima River, it follows, in a generally westerly course, the Yakima, Naches, and Puyallup rivers to Tacoma. No action was taken on this map, and it need not be further considered. It was superseded by—

Map of amended general route, branch line, accepted by the Department June 11, 1879, beginning at a point on the main line, in township 15 north, range 32 east; running southwesterly it crosses the Columbia River at Priests Rapids, in township 14 north, range 23 east; thence across the Cascade Mountains via the Cowlitz Pass, south of Mount Rainier, to Tacoma. The average distance between this line and that of 1873, which it supersedes (no withdrawal having been made on the line of 1876), is something more than 50 miles. A withdrawal of odd sections within 40 miles of this last amended line was ordered July 3, 1879, where same were not already withdrawn, and the even sections increased to the double minimum price. The lands theretofore withdrawn on the former branch line, and falling more than 40 miles from the new line, were ordered restored to settlement and entry at the minimum price and the proper even sections reduced accordingly.

Thus, in Wisconsin, on to the beginning of the constructed line in Minnesota, the land within 20 miles of the general line of 1870, and from thence to the western boundary of the State of Minnesota within 40

321 miles of the constructed line, stand withdrawn as to the odd sections for the benefit of the grant and the even sections within twenty miles have been held subject to entry at \$2.50 per acre under the pre-emption and homestead laws. In Dakota the odd sections within 50 miles of the constructed line westward to the Missouri River and within 40 miles of the general line of 1872, from the Missouri River to the western boundary are withdrawn, and the even sections within 40 miles throughout have been held as double minimum. In Montana and Idaho the odd sections within 40 miles of the general line of 1872 are withdrawn, and the even sections have been held as double minimum. And in Washington Territory and Oregon the odd sections within 40 miles of the general lines of route, main line and branch, and within 50 miles of the constructed road are withdrawn, and the even sections within 40 miles, throughout, have been held as double minimum. Homestead entries on double minimum lands were restricted to 80 acres each.

Under the more liberal laws now in force, however, homestead entries of reserved lands in even sections, lying within railroad limits, are not restricted to 80 acres, and when they have been so restricted, under the former laws, the parties thereto may enter 80 acres additional, adjoining that originally entered; or, if preferred, the original entries may be relinquished and new ones made elsewhere of 160 acres each, credit being given for fees and commissions already paid. (Act of March 3, 1879.)

The several changes in the lines of route have undoubtedly affected settlers to some extent, in that their lands have been left nearer to or more remote from the lines, or proposed lines, of the road; and 322 some persons who have made preemption entries have probably paid at the rate of \$2.50 per acre, while their lands have, by subsequent changes, fallen within the "granted" limits. It is not possible to indicate the extent to which these two classes of settlers have been so affected.

The general effect of the changes made in the lines has been to shorten the same, and to reduce the quantity of land affected by the grant. Notably is this the case in Washington Territory, where by the change in the branch line about 5,000,000 acres were restored to settlement and entry.

The withdrawals ordered upon the filing of the several maps of general route were made under authority contained in the sixth section of the granting act of July 2, 1864, for the purpose of protecting the rights of the company until such time as its road should be definitely located. That section declared that the lands granted after the filing of maps of general route should not be liable to sale or entry or preemption. This has been construed by the Department as creating a legislative reservation immediately upon the filing of said general route maps; and by the decision of your predecessor, Hon. C. Delano, of 22d March, 1873, adopting the opinion rendered by Assistant Attorney-General Smith, it was held that all sales and entries made after such maps were filed were illegal; and he directed the cancellation thereof so far as pertained to lands lying opposite any portion of the road definitely located. He, 323 however, directed that all entries of lands falling within that portion of the grant not definitely fixed be suspended until it should be determined, upon definite location of the road, whether the lands inure to the company.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Undoubtedly the rights of many settlers were affected by this construction of the law, but the subsequent enactment of April 21, 1876—An act to confirm preemption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department"—has operated to relieve all actual settlers who had acquired rights between the time of the filing of the maps in this office and the receipt at the local offices of several letters ordering withdrawals.

I may add, however, that the withdrawals made upon the amended maps, as also those made upon definite locations, have been ordered, with express directions that the same would not take effect until the orders hereof were received at the district offices.

I transmit herewith maps of the several States and Territories named, showing, approximately, the lines of locations above described.

The Senate resolution is herewith returned.

Very respectfully, your obedient servant,

J. M. ARMSTRONG,
Acting Commissioner.

Hon. C. SCHURZ,
Secretary of the Interior.

(Endorsed:) Filed Dec. 13, 1894. J. A. Sladen, clerk.

(Here follow maps marked pp. 324 to 329, incl.)

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INDEX TO APPENDIX.

(Appendix follows page 167 of exhibits.)

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331 F. EXHIBIT A. S. S. M.
(4-207 a)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Jan. 21, 1893.

I, M. M. Rose, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the letters of the Secretary of the Interior, dated August 13th, 1870, is a true and literal exemplification from the original on file in this office, and that the annexed tracings of maps showing the general route of the Northern Pacific Railroad Company are true copies of so much of said maps as are shown thereon.

In witness whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

M. M. ROSE,
Acting Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Aug. 13th, 1870.

SIR: I transmit herewith two maps, showing the designated route of the Northern Pacific Railroad.

You will immediately direct the proper local land officers in the States of Wisconsin and Minnesota to withhold from sale, pre-emption, homestead, and other disposal the odd-numbered sections not sold, reserved, and to which prior rights had not attached, within twenty miles on each side of the route, and in like manner direct the officers in Washington Territory to withhold such odd-numbered sections as lie south of the town of Steilacoom. The unsurveyed, as well as the surveyed, lands will be included in the reservation, and you will direct the local officers to give notice accordingly, and as the township plats are received by them they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

Very respectfully, your obedient servant,

J. D. Cox, *Secretary*.

Hon. Jos. Wilson,

Comm'r of the Gen'l Land Office.

(Endorsed:) The attention of Mr. Reilly, principal clerk of public land, and of Mr. Mendenhall, accountant, etc., will please examine these papers, and promptly take the necessary steps to carry the orders of the Secretary into effect. Jos. S. Wilson, Commissioner. August 13th, 1870. J. 11,893.

(Here follow maps marked pp. 333 to 336, incl.)

337 F.

EXHIBIT F.

S. S. M.

(4-207 a)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Jan. 21st, 1893.

I, M. M. Rose, Acting Commissioner of the General Land Office, do hereby certify that the annexed copies of the letter of E. F. Johnson, dated April 27th, 1867, and Commissioner's reply of May 8, 1867, are true and literal exemplifications from the files and records of this office, and that the annexed copy of so much of a map showing proposed lines of route of the Northern Pacific Railroad, is a true copy of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of the office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

M. M. Rose,
Acting Commissioner of General Land Office.

WASHINGTON, D. C., April 27th, 1867.

Hon. JOS. S. WILSON,
Commissioner Land Office, etc.

338 DEAR SIR: I am directed by the Northern Pacific Railroad Company as their engineer to commence at the earliest practicable moment the survey and location of the line of their road in Wisconsin and Minnesota.

The charter of the company provides that the eastern terminus of their road shall be at a point on Lake Superior, within the limits of one of the two States above named.

Already, as I am informed, two railroad companies, having land grants from the Government, have located their lines connecting with Lake Superior near its western extremity. In order that the line of the Northern Pacific Railroad Company may be so located as to interfere as little as possible with other lines, and secure to the company its quota of land under the grant made to it, it is desirable to know what lands within the limits prescribed in its charter have been disposed of either to railway companies or otherwise, including such as have been withdrawn or reserved to the Indians.

It is not probable that the terminus of the Northern Pacific Railroad, if placed on the northern side of the lake, will be established further east than Buchanan, and if upon the south side, farther east than the head of Chequamegon bay. Should this latter point be selected, the line, on leaving the lake, will probably incline somewhat to the south—not, however, more than about ten miles—and thence it will run by a nearly direct course to near Crow Wing or Fort Ripley, on the Mississippi, and thence to near Breckenridge on the Red River.

Wherever the terminus may be upon the lake, whether at either of the points named or between them, the line will not, I think, cross the Independent meridian, which forms in part the boundary between Wisconsin and Minnesota, farther north than twenty miles north of the fifth correction line in Minnesota, or further south than 339 twenty miles south of the same line.

From this description, and referring to the company's charter, you will be able, I trust, to furnish to the railroad company a sketch of such lands as are available under their grant.

The company, while they desire to make the most of their land grant, will endeavor to so locate their road as that its character for directness between important points and lowness of gradients shall not be in any respect impaired.

Upon the map enclosed I have marked in pencil the limits within which the line of the railroad will probably be placed. With these for a guide, and the company's charter, the space to be embraced in the answer to this request of the company will, I think, be easily ascertained.

Please address me at "Middletown, Connecticut," as I desire to leave soon for Minnesota to commence the survey of the railroad.

Your early attention to the subject will very greatly oblige,

Yours, very respectfully,

EDWARD F. JOHNSON,
Chief Engr. N. Pacific R. R. Co.

(Endorsed :) H 2308. Edwin F. Johnson, Washington, D. C., Apr 27th, 1867, enclosed a map of the Northern Pacific Railroad in the State of Minnesota. Answered May 8th, 1867. Mendenhall—P.—Mendenhall, April 29, 1867.

340

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
May 8th, 1867.

EDWIN F. JOHNSON, Esq.,
Chief Engineer North Pacific Railroad Co.,
Middletown, Connecticut.

SIR: In response to your inquiry of the 27th ulto. relative to the land in Wisconsin and Minnesota which may inure to the Northern Pacific Railroad Co. under the act of 2d July, 1864, I herewith return the diagram accompanying your letter, upon which I have noted the limits of the grant as relates to each route in black and red dotted lines, corresponding to the color of line of route, and would state, first: That the amount of lands which would inure to the grant within the limits of black lines, being the line of road from Buchanan, may be estimated as follows, to wit:

Within limits of grant.....	6,500,000 acs
" " indemnity.....	1,500,000 "
	<hr/> 8,000,000 "
Disposed of within those limits:	
Prior railroad grants.....	1,200,000
Indian reservations.....	3,000
Sold and located.....	1,000,000
	<hr/> 2,500,000
Estimated as inuring to grant.....	<hr/> 5,500,000

Second. The amount of grant which would inure within the limits of red lines, being the line of road from Chequanigon, may be estimated as follows, to wit:

341 Within limit of grant.....	7,500,000
" " for indemnity.....	2,000,000
Total.....	<hr/> 9,500,000
Disposed of within those limits:	
Prior railroad grants.....	4,300,000
Indian reservation.....	300,000
Sold and located.....	1,500,000
	<hr/> 6,100,000
Estimated as inuring to grant.....	<hr/> 3,400,000

I am, sir, very respectfully,

JOS. S. WILSON, Commissioner.

(Here follows map marked p. 342.)



34

F.

EXHIBIT L.

S. S. M.

(4-207)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Jan. 21, 1893.

I, M. M. Rose, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of Commissioner's letter of January 31, 1870, to the local officers at Oregon City, Oregon, is a true and literal exemplification from the record thereof in this office, and that the annexed tracing is a true copy of so much of the map showing the definite location of the Oregon and California Railroad from Portland to Jefferson, Oregon, now on file in this office, as is shown thereon.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year first above written.

[SEAL.]

M. M. ROSE,
Acting Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
January 31st, 1870.

REGISTER AND RECEIVER, *Oregon City, Oregon.*

344 GENTLEMEN: The Secretary of the Interior has transmitted to this office a map of the definite location of the line of the "Oregon Central" Railroad from Portland, in Oregon, to Jefferson, on the Santiam River, in said State, and directed the withdrawal of the lands granted thereto under the second section of the act of Congress approved 25th July, 1886. (Statutes, vol. 14, p. 239.) In compliance with the Secretary's instructions, I transmit herewith a State diagram, showing by red line the 20 miles limits of the grant "in place" by township and half township, and by blue line the 10 additional miles indemnity limits.

You are hereby directed to withhold from sale or location, preemption, or homestead entry all the odd-numbered sections within the limits of 20 and 30 miles.

You will proceed at once to lay down distinctly in pencil on the township plats the limits; then make the proper notes, showing the odd sections to be reserved in the respective limits.

The vacant, undisposed-of odd-numbered sections within the 20 miles limits of said road, as indicated in the diagram, inure "in place" to the company, except wherein there exists preemptions having prior inceptions.

In virtue of the act of Congress approved March 3d, 1853, the even sections within the 20-mile limits are subject to preemption at \$2.50 per acre, and must be dealt with accordingly, and in like manner under the homestead law, which reduces the quantity for each homestead entry to 80 acres.

345 The even sections within the 20 miles will not be subject to private entry until duly offered at the increased price.

The even sections thus lying between the 20 and 30 miles will be dealt with as not reserved.

This order will take effect from the date of its reception at your office and you will advise this office of the precise time it may be received by you.

In your reply please refer to this as M by its date.

So soon as a sectionized diagram is prepared it will be transmitted, by which you can make the lands withdrawn by sections and parts of sections so far as the surveys have progressed.

Very respectfully,

JOS. S. WILSON, *Commissioner*.

(Here follow maps marked, pp. 346 to 350, incl.)

351 In the United States circuit court of appeals for the ninth circuit

THE OREGON & CALIFORNIA RAILROAD COMPANY,	}	No. 275.
John A. Hurlburt, and Thomas L. Evans, appellants,		
<i>vs.</i>		
THE UNITED STATES OF AMERICA, APPELLEES.		

Appeal from the circuit court of the United States for the district of Oregon.

William F. Herrin and William Singer, jr., for appellants; John M. Gearin for appellees.

Before McKenna and Ross, circuit judges, and Hawley, district judge

Ross, circuit judge, delivered the opinion of the court:

The case is this: By the act of Congress of July 2, 1864 (13 Stat., 365) the Northern Pacific Railroad Company was incorporated, with authority to construct and maintain a continuous railroad and telegraph line—

“Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States on a line north of the 45th degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.”

And granting to the company, in aid thereof, every alternate
352 section of public land, not mineral, designated by odd numbers to the amount of 20 alternate sections of land per mile on each side of its line, as the company should adopt, through the Territories of the United States, and 10 alternate sections per mile where the road passes through any State.

“And whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated

by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The sixth section of the act provides that—

"The President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or preemption before or after they are surveyed, except by said company, as provided in this act."

On the 6th day of March, 1865, Josiah Perham, as president of the Northern Pacific Railroad Company, addressed to the Secretary of the Interior the following letter:

WASHINGTON, D. C., 6 March, 1865.

Hon. J. P. UPSHER, *Secretary of the Interior.*

353 SIR: Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia River, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale in conformity to law.

I am, respectfully, your ob't serv't,

JOSIAH PERHAM,
Pres't. N. P. R. R. Company.

Accompanying this letter was a map upon which was traced, in red ink, a line indicated by the letters "H, J, K, L, M, A, B, C," and extending from Lake Superior to Puget Sound, and along which was written this explanatory statement: "H, J, K, L, M, A, B, C, is practicable railroad as surveyed by Governor Stevens."

On the 9th of March, 1865, the then Secretary of the Interior, Mr. Upham, addressed to the Commissioner of the General Land Office the following letter:

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 9th, 1865.

SIR: Herewith I transmit a map upon which the "general line" of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market.

354 In view of the provisions of the 3d and 6th sections of the act of Congress approved July 2, 1864 (Pamphlet Laws, pages 368, 369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the Territories westward

to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad.

The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of Congress.

Very respectfully, your ob't servant,

J. P. UPSHER, *Secretary*.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

Mr. Harlan having, shortly after, succeeded Mr. Upsher as Secretary of the Interior, the Commissioner of the General Land Office, on June 22nd, 1865, addressed to him a letter, stating, in substance, that Secretary Upsher had, under date of March 9, 1865, sent to the General Land Office a diagram showing the proposed route of the Northern Pacific Railroad Company, which diagram had been filed in the Secretary's office, accompanied by a request for the withdrawal of the land along such route; that, as no withdrawal had been ordered by Secretary Upsher, no action was taken in the General Land Office upon the application, and that as Mr. Perham, president of the company, had called attention to the matter, the Commissioner, while proceeding to state objections to the diagram and his reasons for thinking no withdrawal for the benefit of the company should be made, asked for such directions as the Secretary-
355 should deem proper in the premises. Among the objections urged by the Commissioner was this: That the diagram presented to and filed with the Secretary did not constitute such a map of the general route of the proposed road as was required by law and the rules of the Land Department; that these required "a connected map showing the exact location; the map indicating by flagstuffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee," and that, in the judgment of the Commissioner, no withdrawal should be ordered until such a map is filed in the General Land Office. These views of the Commissioner, so far as the record shows, were acquiesced in by the Secretary of the Interior, as well as by the Northern Pacific Railroad Company, for nothing further, so far as appears, was ever done with or under the Perham map or diagram.

On the 14th of July, 1866, Congress made a grant to the Oregon & California Railroad Company in aid of the construction of a line of railroad and telegraph, beginning at the city of Portland, Oregon, and extending thence southerly through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of that State, there to connect with a line of railroad and telegraph to be built from a point on the Central Pacific Railroad, in the Sacramento Valley, in California, to the point of connection at the Oregon line (14 Stat., 239). The grant was of every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections of land per mile (ten on each side) of the designated line, with the provision usually found in such grants for the selection of indemnity lands within defined limits for such sections or parts of sections within the primary limits
as shall be found to have been granted, sold, reserved, occupied
356 by homestead settlers, pre-empted, or otherwise disposed of.

On October 29, 1869, the Oregon & California Railroad Company duly filed in the office of the Commissioner of the General Land Office its map of definite location, showing that portion of the surveyed line it was, by the act of July 14, 1866, authorized to build from Portland southerly to the California boundary, and extending beyond and opposite the lands here in controversy. The map so filed was accepted, and, by the direction of the Secretary of the Interior, the Commissioner of the General Land Office, on the 31st day of January, 1870, ordered the withdrawal, for the benefit of the Oregon & California Railroad Company, from sale or location, pre-emption or homestead entry, all the odd-numbered sections within twenty and thirty miles of the designated line of road. The Oregon & California Railroad Company proceeded to construct the road along the line so designated, and, having completed it, it was inspected by commissioners appointed for the purpose by the President, and, having been found by him to have been constructed in accordance with the terms of the grant, patents were afterwards, and prior to the commencement of this suit, issued to the Oregon & California Railroad Company for the lands in controversy.

Nothing was done by the Northern Pacific Railroad Company under its grant, except the filing of the Perham map or diagram, together with the accompanying letter of the president of that company and his request for the withdrawal of the lands along its line for its benefit, prior to the definite location of the route of the Oregon & California Railroad Company on October 29, 1869.

In the year following, to wit, May 31, 1870, Congress passed a joint resolution by which, among other things, the Northern Pacific Railroad Company was authorized—

357 "To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points." (16 Stat., 378.)

By this resolution, as said by Mr. Secretary Lamar, in *Railroad Co. v. McRae* (6 Land Dec. Dep. Int., 400)—

“The designations of the lines of the road were changed. That which, by the granting act, was known as the ‘branch line’ (via the valley of the Columbia River to a point at or near Portland, in the State of Oregon) was changed to ‘main road’ or ‘main line,’ and that which had been designated as ‘main line’ (across the Cascade Mountains to Puget Sound) was changed to ‘branch line.’ So, by the joint resolution of 1870 (May 31), the company was authorized to locate and construct its main line via the Columbia River, through some point at or near Portland, Or., to a suitable point on Puget Sound, with the privileges, grants, and duties provided for in its act of incorporation.”

After the passage of the joint resolution of May 31, 1870—to wit, on August 4, 1870—two maps, designating the general route of its road, were filed by the Northern Pacific Railroad Company in the General Land Office, upon which orders of withdrawal of the lands along the line indicated thereby were made, respectively, August 13, 1870, and October 27, 1870, within the limits of which withdrawals are the lands afterwards patented to the Oregon & California Railroad Company, and here involved. The Northern Pacific Railroad Company never filed any map of definite location of the line it was authorized to build opposite the lands in controversy, and never built such line, and for its failure in this respect Congress, by the act of September 29, 1890 (26 Stat., 496), forfeited whatever rights, if any, the company had to the lands here in question; and by the present suit the Government seeks to cancel the patents therefor which were issued to the Oregon & California Railroad Company.

That the Oregon & California Railroad Company got nothing by the forfeiture of September 29, 1890, is clear; for the forfeiture declared was for the benefit of the Government only. (*United States vs. Southern Pacific R. R. Company*, 146 U. S., 570.) And if the grant to the Northern Pacific Railroad Company ever attached to the lands in controversy, or if they were withdrawn from the mass of public lands for the benefit of that company at the time the grant to the Oregon & California Railroad Company became effective, it is clear that they were not embraced by that grant, and that the patents therefor should be annulled. The real question in the case, therefore, is, did the lands in question ever become affected by any grant to the Northern Pacific Railroad Company? If they were public lands, not mineral, and not granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of at the time of the grant to the Oregon & California Railroad Company and at the time of the filing of the map of definite location of the route of that company's road along and opposite to them, it is obvious that they would be embraced by the grant to that company, and can not be affected by any grant contained in the subsequent joint resolution of Congress of May 31, 1870. That resolution, as held by the Supreme Court in the case entitled *United States vs. Northern Pacific Railroad Company* (152 U. S., 284, 294-5-6-7), contained a new grant to the Northern Pacific Railroad Company, but did not embrace any public land disposed of after the passage of the act of July 2, 1864. The joint resolution of May 31, 1870, and the proceedings taken thereunder by the

Northern Pacific Railroad Company have, therefore, no bearing whatever on the question in this case, and the effect given by the court below to the maps filed by the Northern Pacific Railroad Company under and pursuant to the provisions of that resolution constitutes one of the errors into which the court below fell in its consideration and decision of this case.

The only thing remaining in the case that could take the lands in controversy out of the mass of public lands to which the grant of 1866 to the Oregon & California Railroad Company applied is the preceding grant to the Northern Pacific Railroad Company of July 2, 1864, and
360 the Perham map or diagram filed thereunder.

It is not pretended that any order of withdrawal was made by any officer of the Land Department based on that map. Was it sufficient, taken in connection with the act of July 2, 1864, to constitute a statutory withdrawal of the lands in question for the benefit of the Northern Pacific Railroad Company?

It was not, for at least two very substantial and obvious reasons. Upon its face, as well as by the letter accompanying it from the president of the Northern Pacific Railroad Company, of date March 6, 1865, it purported to be a designation of the general route of a railroad from a point on Lake Superior, in the State of Wisconsin, via the valley of the Columbia River, to Puget Sound, in the State of Washington, which the letter of its president stated the company had adopted as the line of its road.

That was not the line the Northern Pacific Railroad Company was authorized by the act of July 2, 1864, to locate and build. The line authorized by that act, and in aid of which that grant was made, extended, as has been seen, from a point on Lake Superior, in the State of Minnesota or Wisconsin, westerly, by the most eligible railroad route, on a line north of the 45th degree of latitude and within the territory of the United States, to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus. (13 U. S. Stat., 365; United States vs. Northern Pacific Railroad Company, 152 U. S., 284.)

As said by the Supreme Court, in the case just cited, "Although
361 that act allowed the company to adopt the most eligible route within the territory of the United States north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound which would not touch any point 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget Sound, and, in addition, a branch line leaving the main trunk line at some suitable place not more than three hundred miles from its western terminus and extending 'via the valley of the Columbia River to a point at or near Portland.' If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget Sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus and extended via the valley of the Columbia River to a point at or near Portland. The authority given to the company to adopt the most eligible

route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of latitude. On the contrary, as said in *St. Paul & Pacific Railroad Co. v. Northern Pacific Railroad* (139 U. S., 1, 13), 'when the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.'

The indefiniteness of the Perham map or diagram, which is so manifest on its face, was alluded to by the Supreme Court in the same case (152 U. S., 292), in these words: "It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Company in 1865 constituted the reason why that map was not accepted by the Interior Department."

So it was, as has already been shown. The fact that upon its face it did not purport to be anything more than a mere sketch or diagram, unauthenticated by any engineer or officer charged with the duty of designating such a route, coupled with the fact that it was not only not accepted, but was rejected, by the Land Department of the Government as insufficient to properly designate the general route of the road the company was, by the act of Congress, authorized to build, constitutes a second reason why the granting act did not itself operate to withdraw the lands in controversy for the benefit of the Northern Pacific Railroad Company. They therefore remained public lands to which the subsequent grant to the Oregon & California Railroad Company might apply, unless it be that the grant contained in the act of July 2, 1864, in and of itself, without any designation of the route of its road by the grantee, Northern Pacific Railroad Company, operated to withdraw the lands in controversy from the mass of public lands. And if these lands, why not all other public lands within the territory of the United States situated north of the 45th degree of latitude and between the termini named in the act? It would be difficult to maintain any distinction in this respect between any of the public lands, not mineral, situated in the immense belt through and along which the Northern Pacific Railroad Company might have located and constructed its road.

The court below, in its opinion, held that "It might definitely locate its line in good faith, in compliance with the requirement of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. It is unimportant that the company never exercised this power."

In holding that it is unimportant that the Northern Pacific Railroad Company never exercised its right to locate and build its road along and opposite to the lands in controversy, the court below committed its second error.

It is said that the grant contained in the act, in and of itself, was "an appropriation of the public lands." Of what public lands? Of all the public lands situated within that immense belt through and along which the Northern Pacific Railroad Company was authorized to locate and build its road? Manifestly, if, prior to any designation by the grantee company of the line of road it was authorized to locate and build, the

act making the grant in and of itself operated as an appropriation of any particular land, it operated as an appropriation of all public lands within the United States, situated north of the forty-fifth degree of latitude and between the termini named in the act; for, prior to some designation of the route, it could not be known where the grantee company would find the most eligible railroad route, along which route it was authorized to build. We repeat, therefore, that prior to the designation of some route no distinction can be made between any of the public lands, not mineral, situated in the belt through and along which the Northern Pacific Railroad Company might have located and constructed its road. Is it possible that all of that immense body of public land was, by the act of July 2, 1864, in and of itself, without any designation by the grantee company of the line of its road, withdrawn from subsequent grants? Undoubtedly not. In the case of *United States vs. Southern Pacific Company* (146 U. S., 570) the Supreme Court said that the intent of Congress in all railroad land grants, as has been declared by that court again and again, was that such grants shall operate at a fixed time, and shall take only such lands as at that time are public lands.

364 And in respect to this very grant of July 2, 1864, the Supreme Court, in the case of *United States vs. Northern Pacific Railroad* (152 U. S., 296), in express terms declared that it embraced only public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time its line of road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office. As it is not pretended that any such line, in so far as concerns the lands here in controversy, ever was definitely fixed, how that grant, in and of itself, without any designation of the required route, can be held to embrace these lands we are unable to understand. It requires an act of the grantee to give precision to such grants and to identify by the location of its road the lands embraced by the grant. When that is properly done the grant attaches thereto and becomes effective as of its date; but until there is some designation of route by the grantee there is nothing to segregate any particular land from the mass of public lands, and, manifestly, if such segregation never occurs those that otherwise might be covered by the grant remain public lands and subject to any other valid grant that Congress may have made embracing them. The grant of July 2, 1864, to the Northern Pacific Railroad Company never having taken effect, so far as concerns the lands in controversy in this suit, they were public lands at the time of the grant to the Oregon & California Railroad Company, and at the time of the definite location by that company of the road it was authorized to build along and opposite to them, and falling, as they do, within the terms of that grant, and having been earned by and patented to that company, the judgment is reversed and cause remanded, with directions to the court below to dismiss the bill.

(Indorsed:) Opinion. Filed October 19, 1896. F. D. Monekton, clerk.

365 (Indorsed:) No. . U. S. circuit court of appeals, for the
ninth circuit. vs.

366 United States circuit court of appeals, for the ninth circuit.

THE OREGON & CALIFORNIA RAILROAD COMPANY, John A. Hurlburt, and Thomas L. Evans, appellants,	} No. 275.
<i>vs.</i> THE UNITED STATES OF AMERICA.	

McKENNA, circuit judge, dissenting:

It is contended by appellants that the grant to the Oregon & California Railroad Company is within the reservations of the grant to the Northern Pacific Railroad Company. That is, by filing its map of definite location before the Northern Pacific Company had fixed its line of road, either by a map of general route or definite location, it acquired priority of right by the exceptions in the grant to the Northern Pacific Company. This is important to be considered. If true, it determines the case in favor of appellants, without regard to the propositions considered by the majority of the court. If not true, it is yet important as bearing on those propositions.

Section 3 of the Northern Pacific Railroad act is as follows:

"And be it further enacted, that there be, and hereby is, granted to the Northern Pacific Railroad Company * * * for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line, as said company may adopt through the Territories of the United States, and 10 alternate sections per mile on each side of said railroad whenever it passes through any State; and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof." * * *

The reservation is in italics, and its letter supports the contention of appellants, and it is claimed that it is also supported by *United States vs. Northern Pacific Railroad Company* (152 U. S., 284). In opposition to the contention, appellees rely on *Missouri, &c., Railroad Company vs. Kansas Pacific Railway Company* (97 U. S., 491), and *St. Paul & Pacific Railroad Company vs. Northern Pacific Railroad Company* (139 U. S., 1).

(1) *Missouri, &c., Railroad Company vs. Kansas Pacific Railway Company* (97 U. S., 491) was a suit which involved the title to lands claimed by two railroad companies under grants from the United States. The decision is by Justice Field, and is expressed with the usual clear and firm precision which characterizes his opinions. The grants passed on had reservations similar to those in the present case, and, after considering their nature and the objects of the reservations, he said:

"It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads."

St. Paul & Pacific Railroad Company vs. Northern Pacific Railroad Company (139 U. S., 1) was also a contest between two grants, and one of them the grant to the Northern Pacific Railroad Company. Justice Field said:

"It is also urged against the priority of the plaintiff's claim that by the terms of the act making the grant to the Northern Pacific Railroad Company all subsequent grants prior to the definite location of its road are excepted."

And then, showing that the contention had no application to the case, further said:

"But independently of this conclusion, we are of opinion that the exception in the case making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself." (*Missouri, Kansas & Texas Railway v. Kansas Pacific Railway*, 97 U. S., 491, 498, 499.)

Appellants, however, urge that these expressions are but dicta. If so, they nevertheless were confidently laid down, and in such way as to seem to be the conviction of the whole court. In *St. Paul & Pacific Railway Company v. Northern Pacific Railroad Company* they were one of two answers to an explicit contention which was made; and in *Missouri, &c., Railway Company v. Kansas Pacific Railroad Company* it was the purpose of the court to give such fullness of consideration and decision not only as to what was granted but the limitations on what was granted, and make the case determinative of controversies arising on both.

In *United States vs. Northern Pacific Railroad Company* the controversy was of the ownership of certain lands which the United States claimed by reason of a forfeiture of a grant to the Oregon Central Railroad Company. The Northern Pacific Company claimed them under the grant contained in the resolution of 1870, which is set out in the opinion of the majority of this court.

On the question of the lands being within the resolution of 1870, Justice Harlan, speaking for the court, said:

"But does the grant contained in the resolution of 1870 embrace the particular land in dispute? The act of 1864 granted to the Northern Pacific Railroad Company only public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time its line of road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office. And by the resolution of 1870 it was declared that if at the time of the final location of the company's main line or branch there were not enough lands per mile within the prescribed limits, the deficiency could be supplied from lands within ten miles beyond those limits, other than mineral and other lands, as excepted in the charter of the company, 'to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864.' It is therefore clear that no public land disposed of after the passage of the act of July 2, 1864, was intended to be embraced in the grant of May 31, 1870.

"The lands here in question were disposed of by the United States after the passage of the act of 1864, and before the passage of the joint resolution of May 31, 1870, for they are within twenty miles of the land of the Oregon Central Railroad Company, as shown on its map of definite location, filed January 31, 1872, and based upon the grant to it of May 4, 1870. It is true that the Northern Pacific Railroad Company on the 13th day of August, 1870, acting under the joint resolution of May 31, 1870, filed a map of the general route of its main line from a point on

370 Puget Sound; that, on the same day, twenty sections per mile on each side of the line indicated on it were withdrawn from sale for the benefit of the company; and that this was followed by a map, filed September 13, 1873, of the definite location of its line from Kalama to Tenino. But it is well settled that, in respect to the public lands, within at least common granted or primary limits, priority of grant, not priority of location, determines the question of ownership, as between parties claiming the same lands under different grants." (*Missouri, Kansas & Texas Railway v. Kansas Pacific Railway*, 97 U. S., 491; *United States v. Missouri, &c., Railway*, 141 U. S., 358, 369; *United States v. Southern Pacific Railroad*, 146 U. S., 570, 598, 606.)

It is clear, therefore, that this case does not militate against the *St. Paul & Pacific Railway Company vs. Northern Pacific Railroad Company*, or *Missouri, &c., Railway Company vs. Kansas Pacific Railroad Company*. The point was not presented in the same way, nor did it depend upon the same reason or reasoning.

In the latter cases the reservations were of future dispositions under the ordinary land laws.

In *United States vs. Northern Pacific Railroad Company* (treating the resolution of 1870 as a grant as of that time) the reservations were of prior dispositions. The difference is substantial, and demanded the different interpretation given. From a grant to a railroad company of undefined limits it might be well to except lands to be disposed of under the ordinary land laws and not grants to other railway companies; the former might be consistent with the grant—at any rate, could not impair it to an appreciable extent, or beyond what could be compensated by the *lieu-land* provision—while it would not interrupt the settlement of the country; the latter would be repugnant to the grant and might defeat it utterly.

371 It follows, therefore, that the grant to the appellant road was not within the reservations of the grant to the Northern Pacific Company, and we are brought to the proposition discussed by my learned associates, and upon which I differ from them, to wit: Did the grant to the Northern Pacific Company by the act of 1864 amount to such an appropriation of the lands in controversy as to preclude them from the operation of the grant to the Oregon & California road by the act of 1866?

I state the question without regard to the Perham or other maps filed under the resolution of 1870, for I agree with the majority of the court that neither the Perham map nor that resolution, nor the maps filed under it, have any bearing on the question to be determined, and that if the circuit court gave effect below to such maps it was error. But I am not sure that the circuit court did give effect to them. There is some uncertainty in the statement of the learned judge who presided in that court,

but I am not sure that there was any in his view of the ultimate and decisive question of the case.

Many phases of railroad land-grant cases have been presented to the Supreme Court and have been so firmly established as to become postulates. These are, that grants of that kind are grants in presenti in the nature of a float; that they do not attach to specific sections until identification by a map of definite location of the road; that within what has been called "common granted or primary limits" the date of the grant is the determinative fact in contending railroad grants, not the date of location, giving, if prior, priority of right; if, at the same time, equality of right—that is, giving the land in equal undivided moieties—in neither case can an advantage be secured by priority of location or of construction; that the condition of building the road is a condition subsequent, the right and grant continuing until forfeiture by or entry by the United States, and that the forfeiture or entry, in the absence
372 of explicit legislative declaration, is for the benefit of the United States, not for the benefit of subsequent grantees.

Applying these principles, and the principle that we have seen is likewise established, to wit, that subsequent grants to railroads are not within the reservations of prior ones, how should the question in this case be answered? The last principle expressed removes as irrelevant to contests between railway grants maps of general route or of definite location. They only have purpose to the objects of the reservations, to wit, settlers (homestead or preemption), not railroads. As to these—that is, as to railroads—we can only have regard to the date of the grant and the rights conveyed. I can not see (and I say it with deference) that the consequence, though it inevitably follows that if the lands in controversy be deemed appropriated by the Northern Pacific Railroad act all lands situated north of the 45th degree of latitude must have been withdrawn, is very embarrassing. To what is it embarrassing? To settlers? To the occupation and development of the country under the land laws? Not at all. This is prevented by the reservations in the grant. To other railroad companies? Grants to these was not a constant but an occasional policy, and dependent so much upon special circumstances as to require (certainly not necessarily to exclude) a right of selection of route in a wide territory. If this was to be primarily guarded against or to be afterwards corrected, the remedy was in Congress, and obvious.

But it does not inevitably follow that all the land north of the 45th degree of latitude was withdrawn. The grant had a limitation, and a practical one, too. The right was not to run the road anywhere north of the 45th degree of latitude, but from a point on Lake Superior to a point
on Puget Sound by the most direct eligible route. The Supreme
373 Court said in *United States vs. Northern Pacific Railroad Company*, *supra*:

"Although that act allowed the company to adopt the most eligible route within the territory of the United States north of the 45th degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound which would not touch any point 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget Sound, and, in addition, a branch line leaving the main trunk line at

some suitable place not more than three hundred miles from its western terminus and extending 'via the valley of the Columbia River to a point at or near Portland.' If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget Sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus and extended via the valley of the Columbia River to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it by a map of general route to cover an unlimited extent of country north of the 45th degree of latitude. On the contrary, as said in *St. Paul & Pacific Railroad v. Northern Pacific Railroad* (139 U. S., 1, 13), 'When the termini of a railroad are mentioned for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.'

I have said, as to contesting railroad grants, we do not regard maps, either of general route or of definite location, but only the date of
 374 the grants and the rights conveyed by them. What rights are conveyed by them? There are two, one ultimate and the other provisional. The ultimate one gives a title to a certain number (twenty in the Territories, ten in the States) of specified sections. The provisional gives a power of selection of these from a wider extent of territory. Is it not a substantial and necessary right? May it exist in fullness and with power to exercise in two railroad companies at the same time? Manifestly not. May it exist in them in succession, or, rather, suspended in one until default in the other? If so, when comes default, and how? In the answer to the first of these questions it must, of course, be conceded that Congress has the power to grant a right in the public lands expectant or conditional upon the nonaccruing of another, and probably the reasons for its existence, or the embarrassments of a contrary view, have not been or can not be put more strongly than the ability of counsel have put them in this case. But the same reasoning was urged in one of the first railroad land-grant cases (*Leavenworth, &c., R. R. Co. vs. U. S.*, 92 U. S., 733); it was urged in the last (*U. S. vs. Southern Pacific R. R. Co.*, 146 U. S., 570). It formed the basis of the able dissenting opinion in both cases, but the majority of the court has firmly resisted it—given always the same answer to it—that Congress in any of its grants can not be supposed to have thereby intended to include land previously assigned for another purpose; that it did not intend to cause or invite vexatious conflicts, and that it only concerned the United States what became of land, claims to which were abandoned or forfeited.

In *United States vs. Southern Pacific Railroad*, *supra*, the lands in controversy lay within the granted limits of the Atlantic & Pacific and Southern Pacific companies at the crossing of their lines, as definitely located.
 375 Congress passed an act forfeiting the grant to the Atlantic & Pacific Company, and it was claimed by the Southern Pacific Company under its grant. The Southern Pacific Company filed its map April 3, 1871, more than a year before the Atlantic & Pacific Company filed its map, and it was hence contended that if the title of the

Southern Pacific Company was displaced it was only conditionally displaced—that is, displaced on condition that the Atlantic & Pacific Company should, by the final completion of its road, perfect its right thereto. The court, however, resisted the contention, and held that whatever title or right the Southern Pacific Company might acquire by a prior filing of its map was absolutely displaced when the Atlantic & Pacific Company's map was filed.

"Illy as it may accord," said Justice Brewer, "with the common-law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and, therefore, that in the eye of the law it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific."

Some misunderstanding may arise from the use of the word "attached" in this citation. It is manifest, however, the expression was only used to meet the language of the contention. It is manifest that there was no displacement of title. There never was any in the Southern Pacific Company to be displaced.

There was an act of Congress forfeiting the title of the Atlantic & Pacific Company and the court held that this did not inure to the benefit of the Southern Pacific Company. The case was a controversy over the title to specific tracts. Does its principle apply to a controversy over the right of selection of specific tracts? It is said that there is a passage in the opinion which forbids such application. It is as follows:

"Indeed, the intent of Congress in all railroad land grant, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands, and, therefore, grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands. The question is asked, Supposing the Atlantic and Pacific Company had never located its line west of the Colorado River, would not these lands have passed to the Southern Pacific Company under its grant? Very likely that may be so. The language of the Southern Pacific Company's grant is broad enough to include all the land along its line, and if the grant to the Atlantic & Pacific Company had never taken effect it may be that there is nothing that would interfere with the passage of the title to the Southern Pacific Company."

On a disputable proposition, it is natural to look to any intimation of the Supreme Court, not only because of the supremacy of that tribunal, but because of the learning and roundabout care which are bestowed upon its opinions. Yielding to this to the utmost, I can not find anything authoritative in the passage. Such questions are often put and as often answered as the court answered that one—or rather did not answer it, but only noticed—conceding a possibility which it was not necessary to decisively affirm or deny. But the court proceeded to say that the

result supposed by the question was neither intended nor expected by Congress, and if there had been no act of forfeiture the Atlan-

tic & Pacific could yet have constructed its road and secured the lands. "No power," said the court, "but that of Congress could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent."

This language and reasoning are applicable to every right under the granting acts, whether we consider the intention of Congress or its power to forfeit, and the effect of its exercise of the power, and it seems to me irresistably so.

By the express declaration of the act the grants were made and the rights and privileges were conferred upon and accepted by the Northern Pacific Railroad Company on the condition that it should commence work on the road within two years from the approval of the act by the President, and complete and equip the whole road by the 4th of July, 1876; and the further condition that, if the company should make any breach of the conditions of the grants, and allow the same to continue for upwards of one year, then at any time thereafter the United States might do any and all acts and things needful and necessary to insure a speedy completion of the road. (Secs. 8 and 9.) Subsequently a joint resolution was passed by Congress extending the time for the commencement of the road to July 2, 1868, and for its completion to July 4, 1878. (14 Stat., 355, sec. 2.) On the 31st day of May, 1870, Congress passed the joint resolution, already referred to, giving the company power to make "branch line" "main line," and the latter "branch line," but neither taking away nor giving other rights.

The grant to the Oregon & California Railroad Company was made on the 14th of July, 1866. But the default in commencing the road within two years, or the default in building it, either under the original
378 act or the resolution of 1870, was no concern of the Oregon & California Railroad Company. Nor did the forfeiture of September 29, 1890, inure to its benefit. In other words, it got no rights by either the default of the Northern Pacific or the forfeiture by the United States. By what, then, did it get rights, and when? Only by its grant, if at all. But at the date of that the right of locating its road so as to take the lands in controversy existed unimpaired in the Northern Pacific Company, under the prior grant of 1864, and continued to exist and did exist unimpaired in that company January 29, 1870, when the Oregon & California Company filed its map of definite location; did exist when that company built its road; did exist in 1871 and 1877 when patents were issued to that company. If not, by what was it taken away? Certainly not by any act of the United States, and the United States alone had the power. No act of the Oregon & California Company could do it. The default of the Northern Pacific Company, if it was in any, was no concern of the Oregon & California Company. This company had no rights except, as I have already said, those its grant gave it. It could get none from filing a map of definite location, or none by building its road, or impair none that the Northern Pacific Company received by its grant. This seems very plain, but may not the reasoning be still further extended? Whatever rights passed to the Northern Pacific Company by the act of 1864 could only be lost by abandonment, or by resumption by the United States on account of nonperformance of conditions. Abandonment is not claimed, and if it were, abandonment of rights, as forfeiture of rights, has always been held not to contribute to railroad grants.

Were the rights of the Northern Pacific Company taken away by forfeiture? The majority of the court say no. My brother Ross' language is: "That the Oregon & California Railroad Company got nothing by the forfeiture of September 29, 1890, is clear; for the forfeiture was for the benefit of the Government only. (U. S. v. Southern Pacific R. R. Co., 146 U. S., 570.)" But if not by that act, not at all; and the rights, and all of them, of the Northern Pacific Company still exist, and may yet be exercised. Is not this an irresistible conclusion from the cases? Do not all rights of the Northern Pacific Company in complete fullness exist until they shall be exercised or forfeited? Does not the right to build its road exist and all rights necessary for that greater right also exist? Are they not inseparable? Is not one the complement of the other? And, if so, does not the language of Justice Brewer, in *United States vs. Southern Pacific Railroad Company*, *supra*, accurately apply? I think so. He said:

"Again, there can be no question, under the authorities heretofore cited, that if the act of forfeiture had not been passed by Congress the Atlantic & Pacific could yet construct its road, and that constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant, and now, finding that the Atlantic & Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture for its own benefit."

It follows from these views that the decision of the circuit court was correct.

There are other points urged by appellants, either for modification or reversal of the judgment, which, not being decisive of the merits of the case, I have not considered, in view of the effect of the opinion of the majority of the court.

(Endorsed:) Dissenting opinion. Filed October 19, 1896. F. D. Monekton, clerk.

(Indorsed:) No. . U. S. circuit court of appeals for the ninth circuit. vs. .

United States circuit court of appeals for the ninth circuit.

THE OREGON & CALIFORNIA RAILROAD COMPANY, John A. Hurlburt, and Thomas L. Evans, appellants,	} No. 275.
vs. THE UNITED STATES OF AMERICA.	

Appeal from the circuit court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, and cause remanded, with directions to the court below to dismiss the bill.

(Endorsed :) Decree. Filed Oct. 19, 1896. F. D. Monckton, clerk.

383 (Indorsed :) No. . United States circuit court of appeals
for the ninth circuit. October Term, 189 . Decree. Filed
, 189 . , clerk.

384 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANTS and appellants,	} No. 275.
<i>vs.</i>	
THE OREGON & CALIFORNIA RAILROAD COMPANY, John A. Hurlburt, and Thomas L. Evans, respondents and appellees.	

The above-named complainant, the United States of America, conceiving itself aggrieved by the order and decree entered on the 19th day of October, 1896, in the above-entitled suit in the above-entitled court, doth hereby appeal from said order and decree to the Supreme Court of the United States, and prays that this, its appeal, may be allowed, and that an abstract of the record and proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

DANIEL R. MURPHY,
United States Attorney for the District of Oregon.
JNO. M. GEARIN,
Special U. S. Attorney.

And now, to wit, on the 11th day of December, 1896, it is ordered that the appeal be allowed as prayed for.

JOSEPH McKENNA,
Circuit Judge.

(Endorsed :) Order of judge allowing appeal. Filed Dec. 11, 1896. F. D. Monckton, clerk.

385 In the Supreme Court of the United States.

THE OREGON & CALIFORNIA RAILROAD COMPANY, John A. Hurlburt, and Thomas L. Evans, respondents,	} Assignment of errors.
<i>vs.</i>	
THE UNITED STATES OF AMERICA, APPELLANT.	

Afterwards, to wit, on the day of in the year of our Lord one thousand eight hundred and ninety-six, at the October term for the year 1896 of the Supreme Court of the United States, at the Capitol in the city of Washington and District of Columbia, comes the said The

United States of America, appellant, by Judson Harmon, its Attorney-General, and Daniel R. Murphy, United States attorney for the district of Oregon, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

The United States circuit court of appeals for the ninth circuit, in deciding the above-entitled case, on the 19th day of October, 1896, in and by its decision held, among other things, as follows: "The joint resolution of May 31, 1870, and the proceedings taken thereunder by the Northern Pacific Railroad Company have, therefore, no bearing what-
 386 ever on the question in this case, and the effect given by the court below to the maps filed by the Northern Pacific Railroad Company under and pursuant to the provisions of that resolution constitutes one of the errors into which the court below fell in its consideration and decision of this case." And in so holding and deciding the said the United States circuit court of appeals for the ninth circuit committed error.

II.

That the said the United States circuit court of appeals for the ninth circuit, in deciding said case, on the 19th day of October, 1896, held: "The only thing remaining in the case that could take the lands in controversy out of the mass of public lands to which the grant of 1866 to the Oregon & California Railroad Company applied is the preceding grant to the Northern Pacific Railroad Company of July 2, 1864, and the Perham map or diagram filed thereunder." And in so holding and deciding the said the United States circuit court of appeals for the ninth circuit committed error.

III.

That in deciding said above-entitled suit on the 19th day of October, 1896, the said the United States circuit court of appeals for the ninth circuit held and decided: "It is not pretended that any order of withdrawal was made by any officer of the Land Department based on that map. Was it sufficient, taken in connection with the act of July 2, 1864, to constitute a statutory withdrawal of the lands in question for the benefit of the Northern Pacific Railroad Company? It was not,
 387 for at least two very substantial and obvious reasons." And in so holding and deciding the said the United States circuit court of appeals for the ninth circuit committed error.

IV.

That the said the United States circuit court of appeals for the ninth circuit, in deciding said above-entitled case on the 19th day of October, 1896, decided and held: "They (the lands in dispute) therefore remained public lands to which the subsequent grant to the Oregon & California Railroad Company might apply, unless it be that the grant contained in the act of July 2, 1864, in and of itself, without any designation of the route of its road by the grantee, Northern Pacific Railroad Company, operated to withdraw the lands in controversy from the mass of public lands." And in so deciding and holding the said the United States circuit court of appeals for the ninth circuit committed error.

V.

That the said the United States circuit court of appeals for the ninth circuit, in deciding said above-entitled case on the 19th day of October, 1896, decided and held: "The court below in its opinion held that 'It might definitely locate its line in good faith in compliance with the requirements of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. It is unimportant that the company never exercised this power.' In holding that it is unimportant that the Northern Pacific Railroad Company never exercised its right to locate and build its road along and opposite to the 388 lands in controversy, the court below committed its second error."

And in so holding and deciding the said the United States circuit court of appeals for the ninth circuit committed error.

VI.

That the said the United States circuit court of appeals for the ninth circuit, in deciding said case on the 19th day of October, 1896, decided and held: "The grant of July 2, 1864, to the Northern Pacific Railroad Company never having taken effect so far as concerns the land in controversy in this suit, they were public lands at the time of the grant to the Oregon & California Railroad Company, and at the time of the definite location by that company of the road it was authorized to build along and opposite to them, and falling as they do within the terms of that grant, and having been earned by and patented to that company, the judgment is reversed and the cause remanded, with directions to the court below to dismiss the bill." And in so deciding and holding the said the United States circuit court of appeals for the ninth circuit committed error.

VII.

That the said the United States circuit court of appeals for the ninth circuit, in deciding said case on the 19th day of October, 1896, decided the same in favor of the Oregon & California Railroad Company, John A. Hurlburt and Thomas L. Evans, appellants in that court, and against the United States of America, appellee in that court, and in so deciding the said the United States circuit court of appeals for the ninth circuit committed error.

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VIII.

That the said the United States circuit court of appeals for the ninth circuit, in deciding said case on the 19th day of October, 1896, reversed the judgment of the circuit court of the United States for the district of Oregon and remanded said cause to said United States circuit court for the district of Oregon, with directions to said court to dismiss the bill filed by the United States of America in said cause, and in so deciding and holding the said the United States circuit court of appeals for the ninth circuit committed error.

Wherefore, the said the United States of America prays that the order of the said the United States circuit court of appeals for the ninth cir-

cuit be reversed, and that the said the United States circuit court of appeals for the ninth circuit be ordered to enter an order affirming the decision of the United States circuit court for the district of Oregon in the above-entitled case.

JUDSON HARMON,
Attorney-General for the United States.

DANIEL R. MURPHY,
U. S. District Attorney for the District of Oregon.

(Endorsed:) Assignment of errors. Filed December 21, 1896. F. D. Monckton, clerk.

390 UNITED STATES OF AMERICA, ss:

The President of the United States to the Oregon & California Railroad Company, John A. Hurlburt, and Thomas L. Evans, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to an order allowing an appeal duly filed and of record in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein the United States of America are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in the said order allowing appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph McKenna, judge of the United States circuit court for the ninth judicial circuit, this 22d day of December, A. D. 1896.

JOSEPH MCKENNA,
United States Circuit Judge for the Ninth Judicial Circuit.

391 UNITED STATES OF AMERICA, ss:

On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, F. D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Subscribed and sworn to before me at San Francisco, California, this day of , A. D. 189 .

Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Service of within citation by copy served admitted at San Francisco, California, this 23rd day of December, 1896.

WM. SINGER, JR.,
Attorney for Appellees.

WM. F. HERRIN,
Counsel for Appellees.

(Indorsed:) No. 275. Supreme Court of the United States. The United States of America, appellants, vs. The Oregon and California R. R.

Co. et al. Citation. Filed December 23, 1896. F. D. Monckton, clerk
U. S. circuit court of appeals, 9th circuit.

392 United States circuit court of appeals for the ninth circuit.

UNITED STATES OF AMERICA, APPELLANTS,

vs.

THE OREGON & CALIFORNIA RAILROAD COMPANY,

John A. Hurlburt, and Thomas L. Evans, appellees.

} No. 275.

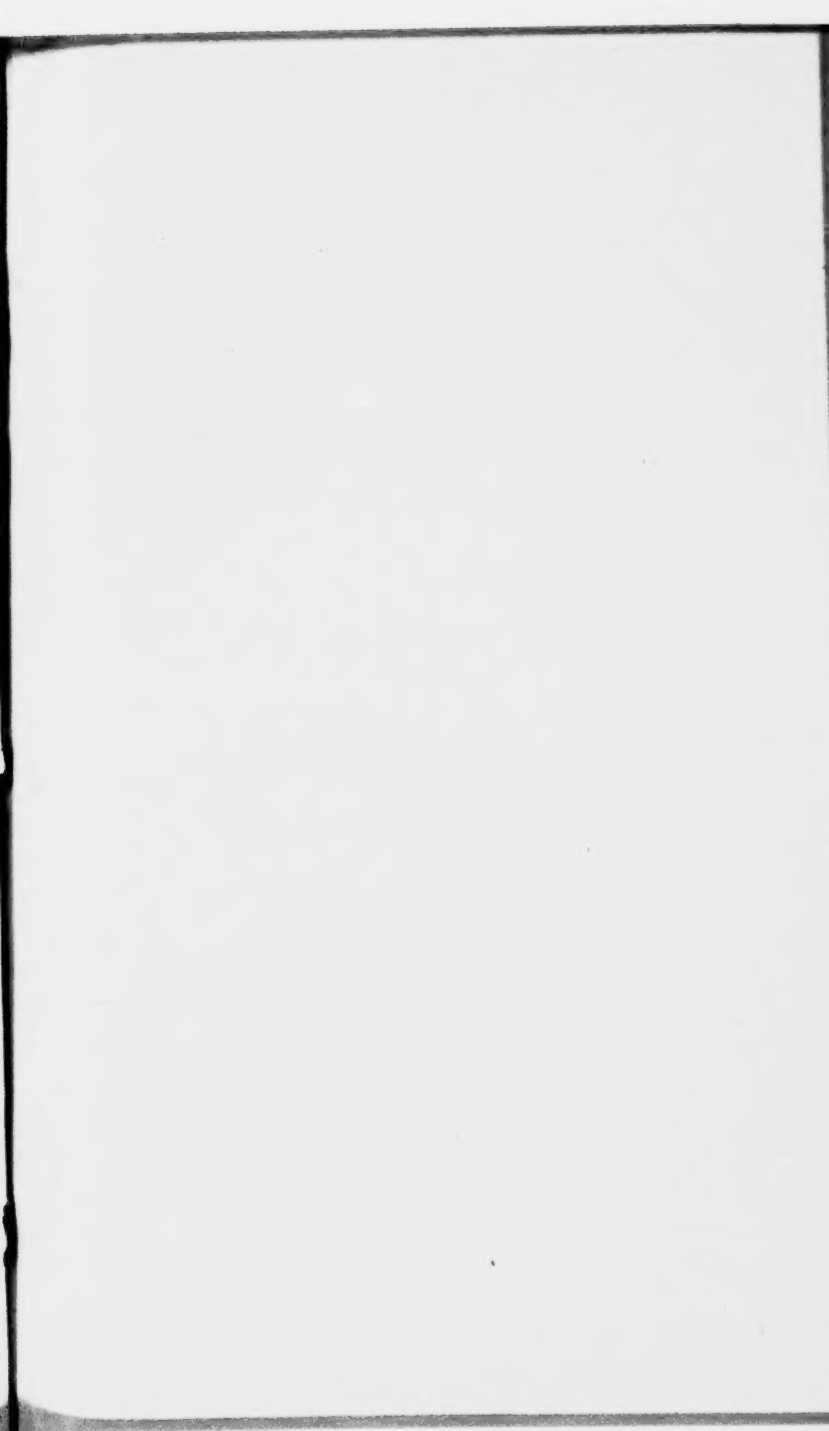
I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing record, being volume 2, consisting of 173 pages, including appendix thereto consisting of 68 pages, together with volume 1 in said cause, containing 158 pages, to be a full, true, and correct copy of the printed transcript of record and of all proceedings in our said circuit court of appeals, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals at San Francisco this 26th day of December, 1896.

[SEAL.]

F. D. MONCKTON, *Clerk.*

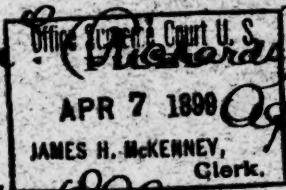
(Indorsed on cover :) Case No. 16478. Term No., 295. The United States, appellant, vs. The Oregon & California Railroad Company, John A. Hurlburt, & Thomas L. Evans. U. S. circuit court of appeals, 9th circuit. Filed January 28, 1897.





N. 52. 9.

Brief of Atty. Gen. (Richardson)



Filed Apr. 7, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE OREGON AND CALIFORNIA RAILROAD
Company, John A. Hurlbert, and Thomas
L. Adams, appellees. } No. 52.

**APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT.**

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,	}	No. 52.
<i>v.</i>		
THE OREGON AND CALIFORNIA RAILROAD		
Company, John A. Hurlbert, and Thomas		
L. Adams, appellees.		

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The question involved is the right of the United States to certain lands near Portland, Oregon, granted to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stats., 365), and forfeited, for failure to construct the road, to the Government by the act of September 29, 1890 (26 Stats., 496), in view of the junior overlapping grant to the Oregon and California Railroad Company by the act of July 25, 1866 (14 Stats., 239), under which that road was constructed and the lands patented to it.

PROCEEDINGS.

The original suit was brought by direction of Attorney-General Miller in the United States circuit court for the district of Oregon to cancel the patents and restore the lands to the public domain. The lands involved amount to about 218,000 acres. The bill of complaint (Record, pp. 1 to 17), as amended (Record, p. 20), was demurred to. On this demurrer Judge Gilbert found in favor of the Government (Opinion, Record, pp. 22 to 29).

Afterwards an answer was filed by the railroad company (Record, pp. 33 to 50), a replication by the Government (Record, p. 50), testimony was taken, and Judge Gilbert rendered judgment in favor of the Government on the merits (Opinion, Record, pp. 63 to 65).

From the decree an appeal was taken by the railroad company to the circuit court of appeals, which, in an opinion by Judge Ross, Judge Hawley concurring, reversed the judgment of the circuit court and remanded the case with directions to dismiss the bill (Record, pp. 168 to 175). From this decision Mr. Justice McKenna, then circuit judge, dissented (Opinion, Record, pp. 176 to 183).

From the judgment of the circuit court of appeals the United States appealed to this court. The assignment of errors is printed in the Record, pages 184 to 187.

THE GRANT OF JULY 2, 1864, TO THE NORTHERN PACIFIC
(13 STATS., 365).

The first section of this act creates the Northern Pacific Railroad Company and authorizes it to construct and

maintain "a continuous railroad and telegraph line, with the appurtenances, namely,"

Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly *by the most eligible railroad route, as shall be determined by said company*, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, *with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon*, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.

The second section contains the grant of right of way and material for construction :

SEC. 2. That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, *adjacent to the line of said road*, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in *width on each side of said railroad* where it may pass through the public domain, including, etc., etc.

The third section contains the land grant :

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure

the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, *every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided further, That all mineral lands be, and the same are*

hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

The fourth section provides for the patents :

SEC. 4. *And be it further enacted*, That whenever said "Northern Pacific Railroad Company" shall have twenty-five consecutive miles of *any portion of said railroad and telegraph line* ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, *and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road;* and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: *Provided*, That not more than ten sections of land per mile, as said

road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided also*, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

The sixth section provides for withdrawals.

SEC. 6. *And be it further enacted*, That the President of the United States shall *cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed*, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, *excepting those hereby granted to said company*. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale.

* * * * *

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific

Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

SEC. 9. *And be it further enacted*, That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upward of one year, then, in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

THE PERHAM MAP, FILED MARCH 6, 1865.

On March 6, 1865, Josiah Perham, president of the Northern Pacific, addressed the Secretary of the Interior a communication saying (Record, p. 81):

Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink *the general line of their railroad* from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, *via the Columbia River*, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the Gen-

eral Land Office, together with a copy of the charter and organization of said company, and that under your directions *the lands granted to said company may be marked and withdrawn* from sale in conformity to law.

The map referred to appears in the Record, page 164, original 336.

From Wallula west the line or lines indicated on the map form a triangular loop. There is a line from Wallula northwesterly across the Cascades to Puget Sound; a line via the valley of the Columbia, on the north side of the river, westerly to a point opposite Portland; and a line from the point on the Columbia opposite Portland northerly or northeasterly to a point on Puget Sound. There is no indication on the map as to which of these lines is the "main" and which the "branch" line.

On March 9, 1865, J. P. Usher, then Secretary of the Interior, transmitted this map to the Commissioner of the General Land Office by a letter (Record, p. 82) in which he recommends the withdrawal requested by Mr. Perham.

On June 22, 1865, the Acting Commissioner of the General Land Office, Mr. Wilson, declined to order the requested withdrawal, holding (Record, p. 83):

The evidence required of the route under the established ruling of the Department is a connected map showing the exact location, the map indicating by flag-staffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section or smallest legal subdivisions cut by the route.

THE JOINT RESOLUTION OF APRIL 10, 1869 (16 STATS., 57).

On April 10, 1869, Congress passed a joint resolution granting a right of way for the construction of a railroad from a point at or near Portland, Oreg., to a point west of the Cascade Mountains, in Washington Territory, the resolution providing (16 Stats., p. 57):

Be it resolved, etc., That the Northern Pacific Railroad Company be, and hereby is, authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: Provided, That said company shall not be entitled to any subsidy in money, bonds, or additional lands of the United States, in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: And provided further, That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed.

Approved, April 10, 1869.

No action was taken by the company under this resolution, because it did not contain any grant of lands to aid in the construction of the proposed extension from Portland to Puget Sound.

THE JOINT RESOLUTION OF MAY 31, 1870 (16 STATS., 378).

On May 31, 1870, Congress adopted the following joint resolution (16 Stats., p. 378), "authorizing the Northern Pacific Railroad Company to *issue its bonds* for the construction of its road, and to secure the same by mortgage, and for other purposes:"

That the Northern Pacific Railroad Company be, and hereby is, *authorized to issue its bonds* to aid in the construction and equipment of its road, and to *secure the same by mortgage* on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and *also to locate and construct*, under the provisions and *with the privileges, grants, and duties provided for in its act of incorporation*, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen

hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July second, eighteen hundred and sixty-four. *And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon,* shall be completed by the first day of January, anno domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided,* That all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided, further,* That in the construction of the said railroad American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

SEC. 2. *And be it further resolved,* That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties.

THE MAP OF AUGUST 13, 1870.

On August 4, 1870, two maps of the Northern Pacific were presented to the Secretary of the Interior by the proper officers of the company, and on these withdrawals were made by the Secretary on August 13, 1870, and October 27, 1870. The lands involved in this suit are within these withdrawals. The maps, with accompanying letter, are printed in the Record, at page 164, marked (original) 333 and 334.

The certificates of Edwin T. Johnson, engineer in chief of the Northern Pacific, and that of J. Gregory Smith, president of the Northern Pacific, are to be found in the Record, pages 87, 90. The letter of Secretary Cox, of August 13, 1870, acknowledging the receipt of the two maps, is printed in the Record, pages 90, 91.

These two maps are referred to in the bill (Record, p. 3), as "maps of general route;" but in the amendment to the bill (Record, p. 20), after stating that no other maps of route or location were filed, and that two withdrawals were made upon these maps, the Government made the following reservation:

Your orator nevertheless reserves to itself the right to insist, if it shall be so advised hereafter and herein, that said map of August 4, 1870, marked "Exhibit A," and said map of March 6, 1865, marked "Exhibit C," to the original bill were maps of definite location of said Northern Pacific Railroad of its line from Wallula Junction to Portland, Oregon.

Previous to the filing of these maps, namely, on February 17, 1870, J. Gregory Smith, president of the North-

ern Pacific, wrote Jay Cooke to confer with the Secretary of the Interior and urge the withdrawal of the lands in favor of the company and its grant. This letter, which was transmitted to the Secretary of the Interior, and Secretary Cox's reply of February 21, 1870, are printed in the Record, pages 85, 86.

FORFEITURE ACT, SEPTEMBER 29, 1890 (26 Stat., 496).

On September 29, 1890, Congress passed an act "to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and for other purposes," the material sections of which act are as follows (26 Stats., 496):

Be it enacted, etc., That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: Provided, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.

* * * * *

SEC. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company, and so resumed by the United States and restored to the public domain, lie north of the line known as the "Harrison line," being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast

quarter of section twenty-seven, in township seven north, of range thirty-seven east, of the Willamette meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July first, eighteen hundred and eighty-five, or who at said date were in possession of any portion of said lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved from the United States at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: *Provided, That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located, according to the provisions of an act of the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the city of Portland with an abundance of good, pure, and wholesome water over and across the following-described tracts of land: Sections nineteen and thirty-one in township one south,*

of range six east; sections twenty-five, thirty-one, thirty-three, and thirty-five, in township one south, of range five east; sections three and five in township two south, of range five east; section one in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five in township one south, of range four east, of the Willamette meridian, in the State of Oregon, *forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore-described strip of land, over and across the above-described sections for the purpose of constructing, maintaining, and repairing a water-pipe line aforesaid.*

* * * * *

SEC. 6. That *no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared to the benefit of the completed line.*

THE GRANT TO THE OREGON AND CALIFORNIA OF
JULY 25, 1866 (14 STATS., 239).

The facts with respect to the grant to the Oregon and California Railroad, the definite location of its line, the withdrawals of land thereunder, the construction of the road, and the issuance of patents are undisputed, and are as follows :

By the act of July 25, 1866 (14 Stats., 239), Congress made a grant of lands to the Oregon and California Railroad Company to aid in the construction of a railroad and telegraph line " within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon," thence to connect with a proposed line of railroad in California, running from the State line to a point of connection with the Central Pacific Railroad in the Sacramento Valley.

The grant was made in the usual form and covered every alternate section of public land, not mineral, designated by odd sections, to the amount of ten sections per mile on either side of the line, reserving therefrom lands granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of, for which lands indemnity was to be allowed as provided in the act, the granting section reading as follows :

SEC. 2. *And be it further enacted*, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of

the mails, troops, munitions of war, and public stores over the line of said railroad, *every alternate section of public land*, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and *when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands*, designated as aforesaid, shall be selected by said companies in lieu thereof under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That bona fide and actual settlers under the preemption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *And provided also*, That settlers

under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

On October 29, 1869, under this act, the Oregon and California Railroad Company filed its map of "definite location" of its line from Portland south, showing a surveyed route for sixty miles and beyond the lands affected by this bill.

On this definite location, the usual withdrawals were made by the Secretary of the Interior on January 31, 1870, and carried into effect by the local officers on February 16, 1870. A portion of the road was thereupon constructed, and commissioners were appointed to examine and report thereon. On December 31, 1869, the commissioners reported that the road had been duly built for the first twenty miles south from Portland. On September 28, 1870, the commissioners reported the due construction of the next twenty miles. Both these reports were approved by the President, and patents for the land coterminous with the completed road were issued to the Oregon and California Railroad Company, of the dates of May 9, 1871; July 12, 1871; July 20, 1876, and July 18, 1877.

THE INDEMNITY LANDS IN THE OVERLAP.

In the pleadings in the case a clear distinction does not seem to have been drawn relative to the locus of the lands in suit with regard to the granted or place limits,

and the secondary or indemnity limits of the grant made by the act of July 25, 1866, to the Oregon and California Road. An examination of the lands described in the bill of complaint in connection with the map or diagram showing the limits of the grant of said company (defendant's Exhibit Q, Record, original page 350, between pages 168 and 169 printed record), discloses that, beginning with the south half of section 35, township 5 south, range 3 east (near top page 12 of Record), all the remaining lands described in said bill are more than 20 miles distant from the line of said Oregon and California Road, and within the 30-mile or indemnity belt. These indemnity lands aggregate about 16,000 acres.

ARGUMENT.

I.

In construing public grants nothing can be taken against the Government by inference. What is not given expressly or by necessary implication is withheld.

In *Dubuque & Pacific Railroad Co. v. Litchfield* (23 Howard, 66), involving the validity of certain land grants, this court, speaking by Mr. Justice Catron, said (p. 88):

All grants of this description are strictly construed *against* the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the

statute; and if not thus expressed, they can not be implied. (*Charles River Bridge v. Warren Bridge*, 11 Peters, 420.)

This language is quoted with approval by this court in *Leavenworth, etc., Railroad Co. v. United States* (92 U. S., 733), Mr. Justice Davis speaking for the court, adding (p. 740):

And if rights claimed under the Government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not given expressly, or by necessary implication, is withheld.

In the *Delaware Railroad Tax Case* (18 Wall., 206) Mr. Justice Field thus states the general rule (p. 225):

All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule.

II.

In construing a railroad land grant, the thing to be ascertained is the intent of Congress. The act is a law as well as a conveyance, and must be so construed as to carry out the legislative will.

In *Missouri, Kansas and Texas Railway Co. v. Kansas Pacific Railway Co.* (97 U. S., 491), there was involved a controversy between two railway companies in lands in Kansas claimed under their respective grants from the United States. Respecting the rule to be fol-

lowed in construing these grants, Mr. Justice Field, speaking for the court, said (p. 497):

It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will.

In *United States v. Southern Pacific Railroad Co.* (146 U. S., 570), in which the land grants to the Southern Pacific and to the Atlantic and Pacific were before this court, the above language is quoted with approval (p. 598), preceded by the following by Mr. Justice Brewer (bottom p. 597):

Illy as it may accord with the common-law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location; but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and therefore that in the eye of the law it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific.

So, in the comparatively recent case of *Wisconsin Central R. R. Co. v. Forsythe* (159 U. S., 46), the court, speaking by Mr. Justice Brewer, said (top p. 55):

But it is a rule of equal if not higher significance that every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress, when ascertained, is to control in the interpretation of the law.

The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together. (*Winona and St. Peter Railroad v. Barney*, 113 U. S., 618, 625; see also *Missouri, Kansas and Texas Railway v. Kansas Pacific Railway*, 97 U. S., 491, 497; *United States v. Southern Pacific Railroad*, 146 U. S., 570, 597; *United States v. Denver and Rio Grande Railway*, 150 U. S., 1.)

III.

The act of July 2, 1864, contains a land grant in aid of the branch line "via the valley of the Columbia River, to a point at or near Portland," which grant covers the lands in dispute. The word "branch" was descriptive only. The various grants in the act of 1864, of the right of way (sec. 2), of material (sec. 2), of land (sec. 3), apply to the entire line, branch as well as main line.

The first section of the act of July 2, 1864, authorizes the Northern Pacific Company to construct and maintain

"a continuous railroad and telegraph line with the appurtenances, namely." It then describes this "continuous line" as follows:

Beginning at a point on Lake Superior, * * * thence westerly by the most eligible route, as shall be determined by said company, * * * to some point on Puget Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.

This is the authority to construct a line, made up of main trunk line and branch, to be located as described.

The second section grants a right of way for 200 feet on each side "of said railroad," with permission to take material for construction "from the public lands adjacent to the line of said road." This grant of right of way and material obviously applies to the entire line, branch as well as main.

The third section makes the land grant in aid of the construction "of said railroad and telegraph line," the grant extending to the specified sections on "each side of said railroad line." The line to be aided, and along which the land grant extends is obviously the entire line, main as well as branch.

The fourth section provides that whenever the company shall have 25 consecutive miles "of any portion of said railroad and telegraph line" completed, the President shall appoint commissioners to examine it, and upon their report patents shall issue for the lands "situated opposite to and coterminous with said completed section

of said road." This provision applies in terms to "any portion" of the line, branch as well as main.

The sixth section provides that after the general route shall be fixed the President shall cause the lands to be surveyed "for forty miles in width on both sides of *the entire line* of said road."

Throughout the act, in all the granting sections, the reference is to the railroad as a unit, the main line with the branch constituting one entire line. To this railroad, this entire line, the various grants of right of way, of material, and of land all applied. It was not intended by using the word "branch" in the first section to distinguish the portion of the line to be built down the Columbia Valley from the so-called "main trunk line," and thus deprive the so-called "branch line" of any of the grants or privileges given to the railroad as an entirety. The word "branch" is one of description, not of limitation. Any other word indicative of the portion of the line to be built via the valley of the Columbia River to Portland could have been used with equal force.

IV.

The resolution of May 31, 1870, did not supersede the land grant of July 2, 1864, on the line to be built "via the valley of the Columbia River to a point at or near Portland," but supplemented it. It authorized a new line from Portland to Puget Sound, and in aid of this made an additional land grant. Otherwise the land grant of 1864 remained in force, the change in designation of portions of the railroad then authorized having no effect upon the grant, which

applied to the entire line, irrespective of the description of its parts.

The resolution of April 10, 1869, authorized the Northern Pacific "to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound." No action was taken under this resolution, because, while it authorized the extension from Portland to Puget Sound, it made no accompanying land grant and gave no right to mortgage anything but the right of way, roadbed, and telegraph line, which power was given by the act of March 1, 1869.

The building of the Northern Pacific had not progressed. The company was embarrassed by the omission in the act of 1864 of authority to mortgage the land grant. Without such power funds could not be obtained to build the road. Hence the resolution of May 31, 1870, which, primarily, as shown by its title, was to authorize the Northern Pacific "to issue its bonds for the construction of its road and to secure the same by a mortgage." By this time the company was satisfied its interests would be advanced by building the road down the valley of the Columbia to Portland and from Portland to Puget Sound. Portland was then the metropolis of Oregon and the largest city in the Northwest. The towns on the Sound which have since become cities were then small and comparatively unimportant in the way of furnishing business for a railroad. It was desirable, therefore, to build to Portland first, in order that business might be secured at once for the new road.

There was another reason. A road from the Upper Columbia over the Cascades to Puget Sound was known

to be difficult to construct. There was doubt whether a pass would be found through the Cascades which would warrant the building of a road from Wallula to the Sound. The object of the act of 1864 being to connect Lake Superior with the Pacific Ocean, if the line over the Cascades failed, the road must necessarily reach Puget Sound by way of the valley of the Columbia. To provide for such a road, a new land grant was necessary from Portland to the Sound. Therefore, in the resolution of May 31, 1870, after giving power to issue bonds and mortgage the road and land grant, this authority is given :

Also to locate and construct, under the provisions, and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.

Evidently the words "branch" and "main trunk line," as used in the act of 1864, were transposed in the joint resolution, because of the authority given to connect the branch down the Columbia River with Puget Sound by a new line from Portland, and because of the fact that the portion of the line from Wallula to the Sound by way of the Columbia Valley was more likely to be constructed than that from Wallula across the Cascade Mountains. This change in the use of words to designate different portions of the Northern Pacific Railroad could not deprive the portions of the line authorized by the act of 1864 of the land grants then made. The portion of the railroad to be

built over the Cascade Mountains to Puget Sound was authorized by the act of 1864. It could not be deprived of its land grant, which dates from 1864, by calling it a "branch line." Neither could the portion of the Northern Pacific to be built "via the valley of the Columbia to a point at or near Portland," which was authorized by the act of 1864, be deprived of the land grant made it in 1864, by changing its name and calling it a part of the main line instead of the branch. Authority to locate and construct the Northern Pacific, as described in the resolution of May 31, 1870, is given expressly "under the provisions *and with the privileges, grants, and duties* provided for" in the act of July 2, 1864.

Opposing counsel insists that the indemnity provision of the resolution of May 31, 1870, shows that Congress intended by this resolution to supersede the act of July 2, 1864, and make a new grant which would be subject to all railroad grants made from July 2, 1864, to May 31, 1870. This contention is based on the provision that the company shall be entitled to indemnity lands.

To the amount of the lands that have been *granted*, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864.

But this provision as to lands that have been "granted" evidently applies only to lands lying along the portion of the road first authorized by the resolution of 1870; that is, the line from Portland to Puget Sound. This becomes apparent in view of the next succeeding provision:

And that twenty-five miles of said main line between its western terminus and the city of Portland, in the

State of Oregon, shall be completed by the first day of January, anno Domini 1872, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points.

The opinion of this court in *United States v. Northern Pacific R. R. Co.* (152 U. S., 284), is conclusive upon the point that the resolution of 1870 authorized a new road only from Portland to Puget Sound, and made a new grant only between these points. The court, speaking by Mr. Justice Harlan, says (p. 294):

We can not agree that this resolution is to be held, in this respect, as simply a recognition by Congress of an existing right in the company to locate and construct a road from Portland to Puget Sound, with the right to obtain lands in aid thereof, as provided in the act of 1864. *On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a new road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound.*

V.

The words "via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon," used in the act of July 2, 1864, locates the so-called branch line with sufficient certainty to identify the lands granted in aid of its construction, and thus preclude the junior grant in 1866 to the Oregon and California from attaching.

The power of Congress to locate the railroad along which a land grant is made must be conceded. Ordinarily, of course, the land grant is made in aid of a line

the location of which is left with the railroad company. But the limits of the discretion vested in the railroad company are usually defined. Under the grant of 1864, no unlimited discretion was reposed in the Northern Pacific Company.

The act authorized the company to locate and construct its main line, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; "thence westerly by the most eligible railroad route, *as shall be determined by said company*," on a line north of the forty-fifth degree of latitude to some point on Puget Sound. As to the main line, authority is thus expressly vested in the company to select the most eligible railroad route within the limitations of the grant. This authority, however, did not give the company the power to cover an unlimited extent of country north of the forty-fifth degree of latitude. In *United States v. Northern Pacific Railroad Co.* (152 U. S., 284), Mr. Justice Harlan, speaking for the court, says (p. 292):

On the contrary, as said in *St. Paul and Pacific Ry v. Northern Pacific Railroad* (139 U. S., 1, 13), "when the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed *upon the most direct and practicable line*. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.

Taking into consideration the provisions with regard to the location of the branch down the Columbia, this

court reached the following conclusion with respect to the location of the main trunk line (p. 292):

It is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound which would not touch any point "at or near Portland," and the western end of which would be east and northeast of a direct line between Portland and Puget Sound.

Within the limitations thus indicated, Congress, in the grant of 1864, gave the Northern Pacific Company the power to locate the main trunk line; but with respect to the "branch," Congress located it in the act itself, leaving to the company to select the suitable place, not more than 300 miles from the western terminus of the main trunk line, where the branch was to join it. The location of the branch is defined in the act. It is to be built "via the valley of the Columbia River." The western terminus is fixed at a point "at or near Portland, in the State of Oregon." The object of Congress is thus stated by Mr. Justice Harlan in the case just cited (152 U. S., 293):

It is clear that the purpose of Congress, by the act of 1864, was not to connect Portland with Puget Sound by a road established upon the most direct or eligible route between those places; *but, so far as Portland and its vicinity were concerned, to connect them with the East by a branch road, through the valley of the Columbia River, that would strike the main trunk line connecting Puget Sound and Lake Superior.*

The court will observe that the lands in controversy lie adjacent to the western terminus of the "branch," which is fixed by the act itself "at or near Portland."

There is no uncertainty, therefore, such as would exist with reference to "the suitable point" at which the branch would connect with the main trunk line.

Judicial notice of the topography of the section of the country involved in this case may be taken. The valley of the Columbia is practically a narrow gorge, at no place more than 6 miles wide. Through the Cascade gorge it is only 600 or 700 feet wide. If the court will not take such judicial notice, pertinent evidence is in the record. Habersham, an engineer and surveyor, thus describes the valley of the Columbia (Record, p. 123):

It is some 5 or 6 miles wide at Vancouver; across to the peninsula, between 3 and 6 miles, it varies considerably, and then it narrows until about at the Cascade gorge it is only 600 or 700 feet wide—above that, it varies in width; above the Cascades, from a quarter of a mile to a half a mile to three-quarters. It is mountainous on both sides from the Sandy River up to Wallula; there the east bank is not so precipitous, and above Pasco I do not, of my personal knowledge, know anything.

A railroad "via the valley of the Columbia River," whether built on the north or the south side of the river, would practically follow the meanders of the river, not of the mountains which form the boundaries of the valley. It would of necessity be built *on the most direct and practicable line* (152 U. S., 292). The land grant carried a strip 20 miles wide on each side of the road when it ran through a State, and a strip 40 miles wide on each side when it ran through a Territory. The land office has put the practical construction on this provision, that if the road runs through a Territory, the land grant belt is 40

miles wide on each side, even if thus measured it extends into a State. In other words, the road if constructed on the north side of the Columbia through the Territory of Washington, would carry a land grant 80 miles wide, and if constructed along the south side through the State of Oregon, a land grant only 40 miles wide. It followed from this, that the road would inevitably be located on the north side of the Columbia River. But if the land office was wrong in its construction, and if the road when built on the north side in Washington only carried a strip 20 miles wide in Oregon, then the location of the line north of the river would be the more advantageous location for the Oregon and California. Located south of the river and nearer Portland, which is on the south side, the Northern Pacific grant would cut deeper into the Oregon and California grant.

For these reasons, I submit to the court that the act itself, read in the light of the existing conditions, was notice to the Oregon and California that the lands in controversy were appropriated and set apart for the benefit of the Northern Pacific. The Northern Pacific could reach a point "at or near Portland" neither by the north nor by the south side of the river without taking these lands under its grant. For this reason, the lands were of necessity reserved by the Government for the use of the Northern Pacific. They were "granted" lands within the exception of the Oregon and California grant.

To effectuate the intention of the grantor, grants more indefinite than the land grant along the branch via the valley of the Columbia have been sustained. (*Newson v. Prior*, 7 Wheat., 7; *United States v. Arredondo*, 13

Pet., 133; *Johnson v. Pannel's Heirs*, 2 Wheat., 206.) These authorities support the principle that where a grant is by a river the line follows the meander and that such words as "at," "about," or "near" a fixed monument or natural object may be rejected so that the object itself will establish the line.

If, on account of engineering difficulties, it became necessary, upon actual construction, to deviate from the route shown upon the map of location such deviation, provided the road kept within the limits of the grant, would not affect rights acquired under the grant by reason of such location laid down in the charter, the company had a right to do so, and to do so without filing a map.

In *Van Wyck v. Knevals* (106 U. S., 360, 369) the court said:

As to the alleged deviation of the road constructed from the route laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it; the lands in controversy are within the required limit, whether that be measured from one line or the other. A deviation of the route without the consent of Congress, so as to take the road beyond the lands granted, might perhaps raise the question whether the grant was not abandoned; but no such question is here presented. The deviation within the limits of the granted lands in no way infringed upon any rights of the defendant.

The rule in the Interior Department is the same, and it has been there uniformly held that the deviation from the line of definite location within the limits of the grant does not impair the grant of lands. (*Rogers v. A. & P.*

R. R., 6 L. D., 565; *Chicago, etc., Railroad Co.*, 6 L. D., 209; *McGregor Western Railroad*, Op. Atty. Genl., Vol. 16, p. 457.)

The court will observe that the overlap in question is at the western terminus of the Northern Pacific branch and the northern terminus of the Oregon and California road. The Northern Pacific ran west, the Oregon and California north. The grant of the Northern Pacific was 80 miles wide, with the road located on the north side of the river. It was impossible for the Oregon and California, with a land grant 40 miles wide, to reach Portland without overlapping the Northern Pacific grant, and the Oregon and California knew it. It took its grant in 1866 with a knowledge of and subject to the prior grant to the Northern Pacific in 1864. It did not have to wait for a definite location, by a surveyed map, of the Northern Pacific branch line to Portland in order to know within what limits the land grant to the Northern Pacific would fall. The act of 1864 itself made plain where the portion of the Northern Pacific land grant which affected it would fall.

VI.

As to the portion of the Northern Pacific line between Wallula and a point near Portland, the Perham map of 1865 was a sufficient map of general route, and the filing of it operated as a statutory withdrawal of the lands in dispute.

The Perham map appears in the record (marked 336, between pp. 164 and 165). While Perham, then president of the Northern Pacific, in his letter to the Secretary of the Interior (Record, p. 81), states that he has

designated on the map "the general line of their railroad from a point on Lake Superior, in the State of Minnesota, to a point on Puget Sound, in Washington Territory, via the Columbia River," yet there is no indication on the map which line from Wallula west is the main and which the branch line. The lines indicated on the map from Wallula west form a triangular loop. There is a line northwesterly across the Cascades to Puget Sound; a line via the valley of the Columbia, on the north side of the river, westerly to a point opposite Portland; and a line from the point on the Columbia opposite Portland northerly or northeasterly to a point on Puget Sound.

Adopting the view taken by this court in *United States v. Northern Pacific Railroad Co.* (152 U. S., 284), the portion of the line designated on the map, from a point on the Columbia River near Portland to Puget Sound, was not authorized by the grant of 1864; but the line down the Columbia River to a point near Portland and the line across the Cascades to Puget Sound were authorized. The unauthorized line on the map can be rejected. The map is good so far as the authorized lines are concerned (*United States v. Southern Pacific R. R.*, 146 U. S., 570, 597), and it was not necessary to mark one the "main line" and the other the "branch." Whether main or branch, the lines were part of the railroad authorized by the act. The grant of the right of way (section 2), the grant of the material for construction (section 2), and the grant of the land subsidy (section 3), each accompany the "railroad line," and the entire railroad line, and was not limited by any reference to the main line or branch line.

While Mr. Usher, then Secretary of the Interior, recommended the withdrawal requested by Mr. Perham, the Acting Commissioner of the General Land Office, Mr. Wilson, declined to do so on the ground that the established ruling of the Department required "a connected map showing the exact location, the map indicating by flagstaffs the progress of the survey." These and other objections urged by the General Land Office were not valid. It has never been held that the map of general route must show a line definitely located upon the ground with all the accuracy of a final survey. The requirements for a map of general route under the Northern Pacific grant were considered by this court in *Butt v. Northern Pacific Railroad* (119 U. S., 55, 72).

The general route may be considered as fixed when its general course and direction are determined, *after an actual examination of the country or from a knowledge of it*, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass.

The letter of Mr. Wilson, Acting Commissioner of the Land Office, shows that at the time the Perham map was filed a large portion of the public lands on the line of the Northern Pacific were unsurveyed (Record, p. 84):

No withdrawal can now be made on account of the road in the region of country extending across that part of the continent between the west boundary of Minnesota to the eastern surveys of Washington Territory, because over that Territory the lines of the public surveys have not yet been established.

The Perham map designates the line down the valley of the Columbia by a reference to the Columbia River. By the scale of the map its distance from that river to any point is approximately ascertainable. The map was sufficiently definite to warrant a withdrawal of the granted lands within the place limits along the line down the Columbia River. I submit that the rights of the company could not be defeated by the fact that the Commissioner of the General Land Office took an erroneous view of the law. In the case of *Boltz v. Northern Pacific Railroad*, to which I have already referred, this court said, respecting the effect of the filing of the map of general route (p. 72):

When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, *the law withdraws from sale or preemption the odd sections to the extent of 40 acres on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted.* Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the Department in such cases to formally withdraw them. It can not be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.

Again, in *St. Paul and Pacific Ry. v. Northern Pacific Ry.* (139 U. S., 1), Mr. Justice Field, speaking for the court, said (p. 18):

They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road.

It was not necessary that the map should be good for the whole road. If good on the branch "via the valley of the Columbia to a point at or near Portland," the filing of it worked a withdrawal of the lands opposite to that portion.

In *St. Paul and Pacific Railroad Co., v. Northern Pacific Railroad Co.* (139 U. S., 1), being a suit to establish the right of the Northern Pacific to land in Minnesota, claimed under the act of July 2, 1864, Mr. Justice Field, speaking for the court, says (bottom p. 18):

It is indeed contended that there is no evidence that any general route was fixed, meaning thereby the general route *for the whole length of the road*. If this were the fact, which is not conceded, the result would not be changed, as supposed by counsel. The contemplated railroad from Lake Superior to Puget Sound was about 2,000 miles in length, and it was not expected that there should be a general designation of the whole route over this distance before any land should be withdrawn or any rights of the company should attach. *The general purpose of the act was accomplished if such reasonable portions*

of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company. The withdrawal in any case would only extend along the route which was fixed, and a map of which was filed in the Department.

In *United States v. Southern Pacific Railroad Company* (146 U. S., 570) the court, speaking by Mr. Justice Brewer, said) p. 597):

So the question is whether the filing a map of definite location from the Colorado River through San Buenaventura to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado River to San Buenaventura, the latter point being the limit of the grant. We think, unquestionably, it is. Though a party claims more than he is legally entitled to, his claim ought not to be rejected for that to which he has a right. The purpose of filing a map of definite location is to enable the Land Department to designate the lands passing under the grant; and when a map of such a line is filed full information is given, and, so far as that line may legally extend, the law perfects the title. It surely can not be that a company must determine at its peril the extent to which its grant may go, or that a mistake in such determination works a forfeiture of all its rights to lands.

With respect to the grant from Wallula to Portland, the Perham map was such a map of general route as was contemplated by the act of 1864. It was, from the nature of the country, practically the only map that ever could be filed. True, no withdrawal of lands was made by the Commissioner of the General Land Office upon

the filing of this map, but the action of the Land Department with reference to the map is not important. There is no provision in the act of 1864 that contemplates an approval of the map of general route by the Commissioner of the General Land Office or the Secretary of the Interior. The act contains a legislative withdrawal within itself upon the filing of the map. In this respect it differs from nearly all the land-grant acts up to that time. I have already referred to the unwarranted requirements made by the Commissioner of the General Land Office. The recommendation of the commissioner could not, however, affect the company. The company had filed its map, and by so doing had complied with the act. The law itself did the rest.

The recommendation of the commissioner was never acted on by the Secretary. The Perham map remained on file in the Land Department as a public record. It still remains there. It must be presumed that the act of July 25, 1866, was passed by Congress with full knowledge of the existence of this map and its legal effect, and that the Oregon and California Railroad Company took its grant with a like knowledge. In 1866, when the Oregon and California Railroad Company took its grant, the Northern Pacific Company had an inchoate right to these lands by the location, in the act of 1864 itself, of the branch line "down the valley of the Columbia," and by the filing of the Perham map, designating the railroad down the valley of the Columbia on the north side of the river.

I have already referred to the rule that in construing the acts of 1864 and 1866 it is the duty of the court to ascer-

tain and give effect to the intention of Congress, for these acts were laws as well as grants. Considering the length of the road, the condition of the country through which it passed, the difficulties, engineering and financial, which attended its construction, the length of time allowed for its completion—twelve years, subsequently increased to sixteen years—it will be unreasonable to assume that Congress, within two years from the passage of the act, intended to take away any portion of the land granted to the Northern Pacific Company.

In closing this point, let me suggest that the sufficiency of the Perham map on this part of the route is conclusively shown by the approval of the map of August 13, 1870, which, down the Columbia River to a point opposite Portland, is identical with the Perham map.

VII.

Whether the Perham map was or was not a sufficient map of general route as to that portion of the Northern Pacific line between Wallula and a point at or near Portland, the filing of it by the company amounted to a claim by the Northern Pacific that it was entitled by law to have the lands in dispute withdrawn and reserved for its benefit. The claim thus made and never withdrawn operated to put these lands sub judice, to separate them from the mass of public lands and prevent the Oregon and California grant of 1866 from attaching.

Upon the filing of a sufficient map of general route the law works a withdrawal. Such withdrawal is to preserve the withdrawn lands for the benefit of the railroad company. The Commissioner of the General Land Office as-

sumed the authority to reject the Perham map. So far as concerns the branch line via the Columbia Valley, he rejected it upon obviously insufficient grounds. But whether he had authority to reject it, and if so, whether he acted upon valid grounds, are questions which were not finally and conclusively adjudicated prior to the grant of 1866 to the Oregon and California. When Congress made the grant in 1866 to the Oregon and California, the Northern Pacific was insisting that under its grant of 1864 and the Perham map filed in 1865 these lands by operation of law were withdrawn and reserved for its benefit.

The Northern Pacific never withdrew the Perham map. It never modified or changed the location of its line down the valley of the Columbia River to a point at or near Portland, as shown on the Perham map. The line designated on the map of August 13, 1870, for this portion of the route is identical with that indicated on the Perham map. Changes were made by the Northern Pacific on other portions of its route, but never on this, for the obvious reason that the contour of the country and the express provision of the law itself confined the company substantially to the line designated on the Perham map.

The resolution of April 10, 1869, authorized the company "to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound," the design being to authorize the entire line shown on the Perham map. No action was taken under this resolution because it made no land grant for the extension and authorized no mortgage (see Point IV).

The resolution of May 31, 1870, authorized the construction of the main road—

To some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.

The Northern Pacific claimed that the effect of this resolution was to approve and confirm the Perham map. It claimed that, under the act of 1864, it was authorized to construct its main line from Lake Superior to Puget Sound by the most eligible route, and if it determined that the most eligible route was via the valley of the Columbia River, it had a right to locate its main line down that valley. Judge Sawyer, in *United States v. Northern Pacific R. R. Co.* (41 Fed. Rep., 842), sustained this contention of the Northern Pacific, holding that the resolution of 1870 was an approval and confirmation of the Perham map and the location made by it. The judge also held that the Perham map was a sufficient indication of the general route, upon which a statutory withdrawal took effect (bottom p. 847).

In the case of the *United States v. Northern Pacific R. R. Co.* (152 U. S., 284) this court overruled the contention, holding that the joint resolution was not simply a recognition by Congress of an existing right, in the company, to locate and construct a road from Portland to Puget Sound, but, on the contrary, should be regarded as giving a subsidy of lands in aid of a new road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound (p. 294).

This court has never passed upon the question whether,

as to the branch to be constructed via the valley of the Columbia River to a point at or near Portland, the Perham map was or was not a sufficient map of general route. If the map was sufficient, the law withdrew these lands in 1865, so that obviously the Oregon and California grant of 1866 could not attach. But did not the filing of the map and the claim by the Northern Pacific that it was valid and worked a withdrawal have the same effect? Thus a mixed question of law and fact was raised by the company upon the decision of which depended an interest which it claimed in the land. This court has frequently held that a pending claim is sufficient to prevent a railroad land grant from attaching, although subsequently the claim is held by the courts to be fraudulent and void.

In *Norhall v. Sanger* (92 U. S., 761), a grant of land in California was made, under the act of July 1, 1862, to a railroad company. The company filed its map of general route probably in January, 1865. A withdrawal was made on January 31, 1865. The land in dispute was within the boundaries of an alleged Mexican grant which was *sub judice* at the time of the grant and withdrawal to the railroad, although the Mexican claim was rejected as fraudulent on February 13, 1865. It was held that lands thus claimed under the Mexican grant were not public lands, and could not be until the claim had been disposed of. For this reason the railroad company acquired no title to them. The court speaking by Mr. Justice Davis, said (bottom p. 762):

There can be no doubt that, by the withdrawal, the grant took effect upon such odd-numbered sec-

tions of public lands within the specified limits as were not excluded from its operations; and the question arises whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, are public within the meaning of the acts of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company.

In the case of *United States v. McLaughlin* (127 U. S., 428) the United States brought a bill to cancel a patent issued to the Central Pacific under its land grant, on the ground that the land in question was covered by a Mexican grant and therefore not public land within the meaning of the railroad grant. This court, speaking by Mr. Justice Bradley, held against the Government, on the ground that the Mexican grant was a float to be located within the limits of a territory largely in excess of the actual grant. The precise location of the land granted under the Mexican land grant was subject to the determination of the Government. The court took the view that if enough land was reserved within the limits of the larger territory to satisfy the Mexican grant, the rest of the land within such territory might be treated as public land and granted to the railroad company.

The case of *Carr v. Quigley* (149 U. S., 652), in which Mr. Justice Field delivered the opinion, like the *McLaughlin* Case, was a controversy between a Mexican grant and a Pacific railroad grant. The court held that lands within the exterior limits of a Mexican grant under judicial investigation at the time of the definite location of the Central Pacific were not "reserved" so as to be taken out of the class of public lands, but inured

to the road as a part of its land grant, thus following the McLaughlin Case and upon the same grounds.

Page 662:

It was for the Government itself to prescribe the limits from which the quantity granted by the Mexican Government should be selected, and having reserved sufficient from the exterior boundaries to satisfy that amount it was perfectly competent for it to grant any surplus remaining, and it appears from the actual survey of the specific quantity granted by Mexico that the Congressional grant to the railroad company was outside of any of the land thus appropriated.

In the present case, however, the Government did not have the option of determining the location of the land grant made to the Northern Pacific under the act of 1864. Congress, in the act itself, indicated where it desired the branch line located, and the company, in accordance with that direction, filed its map designating the portion of its line "via the valley of the Columbia River to a point at or near Portland." Having done this, the lands within the place limits of the designated line became sufficiently identified and ceased to be public lands in the sense that it would be included in any subsequent railroad land grant containing the usual terms of exception. Nothing in the entire jurisprudence of this country is more firmly established than that an undetermined claim or a reservation of land severs it from the mass of "public land" so that it will not pass under railroad aid grants. (*Wilcox v. Jackson*, 13 Pet., 498; *Leavenworth, etc., R. R. v. U. S.*, 92 U. S., 740; *Newhall v. Sanger*, 92 U. S., 761; *K. P. R. R. v.*

Dunneyer, 113 U. S., 629; *Doolan v. Carr*, 125 U. S., 618; *Hastings Railroad v. Whitney*, 132 U. S., 357; *U. S. v. Missouri R. R.*, 141 U. S., 358; *Sioux City Land Co. v. Griffey*, 143 U. S., 32, 41; *Bordon v. N. P. R. R.*, 145 U. S., 535; *Cameron v. U. S.*, 148 U. S., 301; *Whitney v. Taylor*, 158 U. S., 85, 92, 93; *Shiver v. U. S.*, 159 U. S., 491, 494; *N. P. R. R. v. Sanders*, 166 U. S., 620, 633.)

It has been repeatedly held that, when a proper map of general route is filed, the law operates to withdraw the lands within the limits of the grant, and this withdrawal takes effect whether it is expressly ordered by the Secretary of the Interior or not. (*Missouri R. R. v. Kansas R. R.*, 97 U. S., 491; *Van Wyck v. Kuevals*, 106 U. S., 360; *Railroad v. Dunneyer*, 113 U. S., 629; *Walden v. Kuevals*, 114 U. S., 373; *Buttz v. N. P. R. R.*, 119 U. S., 55; *St. Paul, etc., R. R. v. N. P. R. R.*, 139 U. S., 1; *U. S. v. S. P. R. R.*, 146 U. S., 570; *U. S. v. N. P. R. R.*, 152 U. S., 284; *Railroad v. Forsyth*, 159 U. S., 46.)

VIII.

The question is submitted whether, as to the portion of the Northern Pacific, "via the valley of the Columbia," from Wallula to Portland, the map of August 13, 1870, was not in effect a map of definite location. Did it not so fix the route of the road on this portion as to identify the granted lands so that the title in the Northern Pacific attached as of the date of the original grant of 1864?

With respect to this portion of the road from Wallula to opposite Portland, the line designated on this map is identical with that laid down on the Perham map (*United*

States v. Northern Pacific R. R., 152, U. S., 284, 290). Under it a withdrawal of the lands in question was ordered. This fact conclusively shows that the Perham map was a sufficient and valid map of general route on this portion of the line, and that there was a legislative withdrawal at the time of its filing. Any uncertainty or or change as to other portions of the railroad did not affect this portion, which remained unchanged from the beginning.

The map of August 13, 1870, is to be found in the record facing page 164 and marked 333. The certificate of Edward T. Johnson, engineer in chief of the Northern Pacific since June, 1866, states (Rec., p. 87):

That during the period above named, surveys and explorations have been made at various places on the proposed route for said road for determining its proper location, and that in connection with said surveys examinations have been made and information has been collected relative to other portions of said route sufficient to enable the said company to determine approximately, and by reference to appropriate landmarks, the proper position for the line of their said road on those portions, with a view to the withdrawal from market or from settlement of the lands granted to the said company on either side of their said road.

In other words, Mr. Johnson says that part of the route has been surveyed and explored to determine its proper location, and examinations have been made and information has been collected relative to other parts of the route sufficient to enable the company to determine the line approximately. Mr. Johnson then describes the

routes designated on the maps, the following being the description from Portland to Wallula (Rec., p. 89):

Thence from Fort Vancouver, following the right or northerly bank of the said Columbia River, on or near the line of high-water mark of the same, eastwardly through the Cascade range of highlands to a point opposite the mouth of the Walla Walla River, a distance of 190 miles, more or less.

The certificate of Gregory Smith, the president of the Northern Pacific, contains the following (Record, p. 90):

It is hereby certified that in pursuance of the act of Congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and the several acts amendatory thereto, certain portions of the line or route for said road were so far *definitely fixed by resolution* of the board of directors of said company on the eighth day of July, A. D. 1870, as to make it the duty of the president of the said company to request the honorable the Secretary of the Interior to withdraw or withhold from sale and settlement the public lands to which said company are entitled on either side of the lands of their road so described as aforesaid in the certificate of their engineer in chief.

The letter from Secretary Cox to the Commissioner of the General Land Office, transmitting these maps, speaks of them as "two maps showing *the designated route* of the Northern Pacific Railroad" (Record, p. 79).

The letter from the Commissioner of the General Land Office to the register and receiver at Oregon City, Oreg., transmits "a diagram showing *the designated route* of the

Northern Pacific Railroad under the act of July 2, 1864" (Record, p. 80), and directs the withdrawal.

An examination of the Record discloses that changes were made in other portions of the line designated on the map of August 13, 1870, but no change was made on the portion between Wallula and Portland, and no change was contemplated. In view of the provisions of the law itself, the location of this portion of the line was not an approximate but a definite location. Undoubtedly the company never intended the map of 1870 to be treated as a map of definite location for its entire route from Lake Superior to Puget Sound, but it did intend that certain portions of this route should be treated as definitely fixed. The only means we have of ascertaining upon what portions it intended the map to be a map of general route, with the reserved power to change, and upon what portions a map of definite location, with no contemplation of changing, is to inquire on what portions of the route changes were made and subsequent maps filed. Certainly no subsequent map was filed of this portion of the line between Wallula and Portland, and therefore this map of 1870, as to that portion, may be treated as a map of definite location.

Secretary Cox, in transmitting the map of 1870 to the General Land Office, and the Commissioner of the General Land Office, in transmitting the same to the register and receiver at Oregon City with directions for a withdrawal, speaks of the map as one "showing the designated route" of the road. A "designated" route is a route of definite location. This court, speaking by Mr. Justice Harlan,

so held in the recent case of *Southern Pacific R. R. Co. v. United States* (168 U. S., 1, 54):

The word "designated" in that act meant no more nor less than the words "definitely located" mean.

As to the entire route from Lake Superior to Puget Sound, the map of 1870 may very properly be termed a map of general route, but as to the portion from Wallula to Portland it is in effect a map of definite location. The description which accompanies the map locates the line of the road with all requisite certainty. From Fort Vancouver it is to follow the right or northerly bank of the Columbia River, on or near the high-water mark of the stream, eastwardly through the Cascade range of highlands to a point opposite the mouth of the Walla Walla River. Certainly there is no lack of certainty in this route. It identifies the lands within the granted limits so there can be no difficulty in specifying them, and in point of fact a withdrawal was promptly made and never changed.

In the earlier cases, where, after the filing of a map of general route, and a withdrawal under it, the road was built on the line thus designated, the court held that the filing of such a map of general route had the effect of filing a map of definite location. The map of general route, not being modified or changed, became the map of definite location, upon which the road was built.

The case of *Norhall v. Sanger* (92 U. S., 761) grew out of a grant of land in California, under the Union Pacific act of July 1, 1862, to the Western Pacific Railroad Company. The act made a grant of certain sections "not sold, reserved, or otherwise disposed of by

the United States, and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed" (sec. 3, act July 1, 1862; 12 Stats., 492). The act also requires that "within two years after the passage of said act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within 15 miles of said designated route or routes to be withdrawn from preemption, private entry, and sale" (sec. 7, act of July 1, 1862; 12 Stats., 493). The company filed its map of general route probably in January, 1865; at any rate the withdrawal was made on January 31, 1865. The land in dispute was within the boundaries of an alleged Mexican grant which was *sub judice* at the time of the grant, the filing of the map, and the withdrawal, the claim not being finally rejected until February 13, 1865. The court held that the lands thus claimed under this Mexican grant, ultimately held fraudulent and void, were not public lands, and for this reason the railroad company acquired no title to them. It is notable that the filing of the map of general route and the withdrawal under it are treated by the court as the important fact in determining whether the title of the railroad company attached. The court, speaking by Mr. Justice Davis, says (bottom p. 762):

There can be no doubt that, by the withdrawal, the grant took effect upon such odd-numbered sections of public lands within the specified limits as were not excluded from its operation; and the question arises

whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, a republic within the meaning of the acts of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company.

So, in the case of *M. K. & T. R. R. v. K. P. R. R.* (97 U. S., 491). In that case it is stated that the grant to the Kansas Pacific was made in 1862, and a map of general route filed in 1866, and the road completed in 1867. The M. K. & T. grant was made in 1866, and the map of its route filed in December, 1866.

IX.

Opposing counsel insist that the map of 1870 was one of general route. Conceding this to be true, did not the resultant withdrawal of these lands divest the Oregon and California of the title it claims attached by filing its map of definite location in 1869? If so, when did or could such title reattach? The withdrawal reserved the lands for the benefit of the Northern Pacific until the forfeiture, which was made for the benefit of the Government.

The claim of the Oregon and California is that by filing its map of definite location on October 29, 1869, it acquired the title to these lands under its grant of July 25, 1866. But at this time the Northern Pacific, under its grant of 1864, had the right to locate and construct its road so as to earn and take these lands as against the Oregon and California under its junior grant.

The grant of July 2, 1864, conferred upon the Northern Pacific a number of rights with respect to these lands.

In the first place, under section 6 of the act, it had a right to so locate its line by the filing of a map of general route as to entitle it to have these lands withdrawn for its benefit.

In the second place, by filing its map of definite location, under the third section of the act of 1864, it had a right to acquire the title to these lands.

In the third place, under section 4, by presenting proof of the completion of specified portions of the road, it had a right to obtain patents confirming its title to the lands.

Upon the theory of the other side, it exercised only the first of these rights. It filed its map of general route, and thereby selected these lands for withdrawal for its benefit. This was done on August 13, 1870. But at this time the title of the Oregon and California had attached, because of the prior filing of its map of definite location. In view of this, what was the effect of the withdrawal made for the benefit of the Northern Pacific? Was it a withdrawal subject to the rights of the Oregon and California? I think not. If the Northern Pacific had followed the withdrawal by a construction of its railroad opposite to these lands, it would have taken them free from any claim of the Oregon and California. The withdrawal amounted to a provisional selection for the benefit of the Northern Pacific. Its object was to preserve the status of the lands, so the Northern Pacific might earn them by building its road opposite to them. The inevitable result, therefore, of the withdrawal, which took effect upon the filing of the map of general route,

was to clear the land of whatever title had attached in favor of the Oregon and California, under its map of definite location in 1869.

To repeat, no matter if the Oregon and California did file its map of definite location before the Northern Pacific had filed its map of general route, nevertheless the Northern Pacific under its prior grant had a right, after the filing of the map of definite location of the Oregon and California, to select and earn these lands. It had a right to construct its road opposite to these lands and take them under its grant. It had a right to precede its construction by a map of definite location and, by filing it, attach its title to these lands. It had a right to precede its map of definite location by a map of general route and thus select these lands and have them withdrawn for its benefit. It took the first of these three steps—it filed its map of general route. The lands were withdrawn for its benefit. By that act whatever provisional title the Oregon and California may have acquired was swept aside, its title was divested, the lands were set apart and preserved for the benefit of the Northern Pacific.

In the case of the *United States v. The Southern Pacific Railroad* (146 U. S., 570), where the contest was between two railroad grants, that to the Atlantic and Pacific being prior in point of time, Mr. Justice Brewer, speaking for the court, says (p. 597):

In this connection reference may be had to the contention of the Southern Pacific Company that it filed its map of definite location on April 3, 1871, more than a year before the filing of its map by

the Atlantic and Pacific Company; that, therefore, its title then attached to these lands, the same as to any other lands along its line; and that if such title was displaced by any subsequent filing of the Atlantic and Pacific Company's map it was only conditionally displaced; that is, displaced on condition that the Atlantic and Pacific Company should, by the final completion of its road, perfect its right thereto. But whatever title or right the Southern Pacific Company might acquire by a prior filing of its map *was absolutely displaced* when the Atlantic and Pacific Company's map was filed.

How, then, was it possible for the Oregon and California title to reattach? When could or did such title reattach? The withdrawal preserved the status of the lands until the forfeiture in 1890. And the forfeiture was for the benefit of the Government.

Observe the wording of section 6, under which the withdrawal takes place. It is "the odd sections of land hereby granted" which are withdrawn. The sections withdrawn are treated as the sections granted, until the company modifies its route and selects other lands. Being thus treated as "the odd sections of land hereby granted" they are treated as sections granted at the time of the grant, which is one *in presenti*, and therefore free from junior railroad grants.

Respecting the effect of filing the map of general route, and in support of the point I make that by a withdrawal certain rights, however inchoate or provisional they may be, do attach to the withdrawn lands in favor of the railroad company for whose benefit they have been set aside, I refer to the following cases, merely observing

that if, by the withdrawal, the railroad company for whose benefit it is made acquires any interest whatever in the land, or any title, however inchoate or imperfect, the lands become in a sense "granted lands," and subject to forfeiture by the Government. Until forfeited they must needs remain withdrawn lands, lands which, for the benefit of the grantee, the Government has set aside to preserve (using the language of Mr. Justice Field, in 139 U. S., 1, 18) "unencumbered until the the completion and acceptance of the road."

In *Bullz v. Northern Pacific Railroad Co.* (119 U. S., 55), the effect of filing the map of general route under the act of July 2, 1864, was before this court. Mr. Justice Field, speaking for the court, said (p. 71):

The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from preemption, grant, or other claims or rights; but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or preemption of the adjoining odd sections within 40 miles on each side, until the definite location is made. The sixth section declares that after the general route shall be fixed, the President shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or preemption before or after they are surveyed, except by the company. The general route

may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the Land Department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office or the Secretary of the Interior *the law withdraws from sale or preemption the odd sections to the extent of 40 miles on each side.*

Subsequently, in *St. Paul and Pacific Railroad Co. v. Northern Pacific Railroad Co.* (139 U. S., 1), being a suit by the Northern Pacific to establish its right to land in Minnesota as against the St. Paul and Pacific, this court, by the same justice, had occasion again to express its views with respect to the effect of the filing of a map of general route, as follows (p. 18):

It is indeed contended that there is no evidence that any general route was fixed, meaning thereby the general route for the whole length of the road. If this were the fact, which is not conceded, the result would not be changed, as supposed by counsel. The contemplated railroad from Lake Superior to Puget Sound was about 2,000 miles in length, and it was not expected that *there should be a general designation of the whole route over this distance before*

any land should be withdrawn or any rights of the company should attach. The general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company. The withdrawal in any case would only extend along the route which was fixed, and a map of which was filed in the Department.

It will be observed that the court does not take the position that no rights of the company attached until the definite location is made, but, on the contrary, holds that it is only necessary that the partial designation of the general route should be made in order that land be withdrawn and rights of the company attach.

In *Northern Pacific Railroad Co. v. Sanders* (166 U. S. 620) it was held that the filing of a claim as mineral land, upon lands within the limit of the Northern Pacific grant of 1864, as shown by its map of general route filed February 21, 1872, but before the filing of the map of definite location on July 6, 1882, operated to except such land from the Northern Pacific grant. This was on the ground that the filing of the mineral claim put the land covered by it within the exception defined by the third section of the grant of 1864. It thus became land to which a claim had attached, land *sub judice*. The existence of the claim was sufficient. The validity of the claim was a matter to be settled subsequently between the Government and the claimant. It is to be observed that the Northern Pacific grant, like other railroad grants, did not apply to mineral land. It only covered "public land not mineral."

The court cites *Kansas Pacific Ry. v. Dunmeyer*, 113 U. S., 629; *Hastings & Dakota R. R. v. Whitney*, 132 U. S., 357, 366; *Whitney v. Taylor*, 158 U. S., 85, 92, 93; *Sioux City, etc., Land Co. v. Griffey*, 143 U. S., 32, 34, and *Shiver v. U. S.*, 159 U. S., 491, 494, saying, by Mr. Justice Harlan, p. 633:

The principles announced in these cases fully sustain the proposition that if the above applications of record to purchase these lands as mineral lands were "claims" within the meaning of the act of July 2, 1864, then the lands were excepted from the operation of that act and could not have come under the grant to the railroad company even if, subsequently to the definite location of the road, the applications for them were finally rejected because of the fact that they were ascertained not to be mineral lands.

Respecting the effect of filing the map of general route, the court says (bottom p. 634):

The company acquired, by fixing its general route, *only an inchoate right to the odd-numbered sections granted by Congress*, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted.

This language was quoted with approval in the carefully considered case of *Menotti v. Dillon*, 167 U. S., 703, 720.

In *Northern Pacific Railroad Co. v. Musser-Sauntry Co.* (168 U. S., 604), it was held that a withdrawal of lands within the indemnity limits of the grant of 1856 to the State of Wisconsin to aid in the construction of a railroad exempted such lands from the operation of the

grant to the Northern Pacific Railroad Company by the act of July 2, 1864. Mr. Justice Brewer, who delivered the opinion, says (bottom p. 607):

The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation. (*Wolcott v. Des Moines Co.*, 5 Wall, 681; *Wolsey v. Chapman*, 101 U. S., 755, and cases cited in the opinion; *Hamblin v. Western Land Company*, 147 U. S., 531, and cases cited in the opinion.) It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. (*St. Paul and Pacific Railroad v. Northern Pacific Railroad*, 139 U. S., 1, 17, 18; *Wisconsin Central Railroad v. Forsythe*, 159 U. S., 46, 54; *Spencer v. McDougal*, 159 U. S., 62.)

Again, page 608:

But beyond the significance of the word "reserved" alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and evidently when the withdrawal was made in 1866 *it was an appropriation of these lands so far as might be necessary for satisfying that particular grant*. It is true it was not a final appropriation or an absolute passage of title to the State or the railway company, for that was contingent upon things thereafter to happen; first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such

deficiencies. Again, in the description are the words "free from preemption or other claims or rights." Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. (*Northern Pacific Railroad v. Sanders*, 166 U. S., 620.) And such is the general rule in respect to railroad land grants.

Again (p. 611):

It may be well in concluding this opinion to again note the fact, already mentioned, that the withdrawal here considered was one in favor of an earlier grant. It may be that a different rule would obtain in case it was in favor of a later grant. *As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants and not on the times of the filing of the maps of definite location. In other words, the earlier grant has the higher right. No scramble as to the matter of location avails either road, and it may be that the same thought would operate to uphold the title to the place lands of an earlier as against a withdrawal in favor of a later grant. Neither is it*

intended to question the rule that the title to indemnity lands dates from selection and not from the grant. All that we here hold is that when a withdrawal of lands within indemnity limits is made in aid of a earlier land grant and made prior to the filing of the map of definite location by a company having a later grant, the latter having such words of exception and limitation as are found in the grant to the plaintiff, it operates to except the withdrawn lands from the scope of such later grant.

X.

It was not the purpose of Congress, in using the word "granted" in the clause defining the exceptions to the land grant of July 2, 1864, to except from the operation of that grant any portion of the designated lands for the purpose of aiding in the construction of other roads under subsequent grants.

The grant in the third section of the act of July 2, 1864, applies to lands to which—

The United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

It is claimed that under this exception Congress reserved the right to grant lands covered by the Northern Pacific grant to other railroads, and that under this reservation Congress did make the grant to the Oregon and California. It is only necessary to refer to a few decisions of this court to dispose effectually of this contention.

In *M., K. & T. R. R. v. K. P. R. R.* (97 U. S., 491) the court passed upon a controversy between two railway companies for lands in Kansas claimed under conflicting grants. Respecting the character of the exception in the earlier grant, one similar to that under consideration, Mr. Justice Field, speaking for the court, said (bottom p. 498):

The grant was made in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specially withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the Government. It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads.

Again, in *St. P. & P. R. R. Co. v. N. P. R. R. Co.* (139 U. S., 1), with respect to the very contention made here, that the Northern Pacific grant made an exception in favor of subsequent grants to other roads made prior to its definite location, the court, speaking through Mr. Justice Field, says (bottom p. 17):

But, independently of this conclusion, we are of the opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. (*Missouri, Kansas and Texas Railway v. Kansas Pacific Railway*, 97 U. S., 491, 498, 499.)

XI.

The grant of 1866 to the Oregon and California applied only to public lands, and can not be held to include land appropriated under the prior grant of 1864 for the benefit of the Northern Pacific.

The Oregon and California grant applies only to "public lands" not mineral. Express exception is made of those sections or parts of sections "found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of." In place of these indemnity lands are to be selected.

The lands in question were not public lands at the time of the Oregon and California grant in 1866, or at the time of the definite location of that road in 1869, because the act of 1864, at both these dates in full force and effect, had set aside and disposed of these lands for the benefit of the Northern Pacific. The Northern Pacific grant of 1864 gave that company the right to locate and construct its "branch," via the valley of the Columbia River, to a point at or near Portland, and so earn these lands granted by the act in aid of such contemplated road. The Oregon and California grant of 1866 did not take away this right granted in 1864 to the Northern Pacific. On the contrary, it was made subject to it. Land not public, but which had been granted or otherwise disposed of, was expressly excepted.

The Oregon and California grant of 1866 never attached to these lands, because at the time of the grant and at the time of the definite location in 1869 the

lands were identified as lands disposed of for the benefit of the Northern Pacific under its grant of 1864.

The act of 1864 itself identified these lands, because they were within the place limits of any road that could be located and built "via the valley of the Columbia River to a point at or near Portland."

They were further identified by the filing of the Perham map of 1865, being within the primary limits of the line designated thereon.

The rule is settled that within common granted or primary limits priority of grant, not priority of location, determines the question of ownership as between railroad companies claiming the same lands under different grants. (*M., K. & T. Ry. v. K. P. Ry.*, 97 U. S., 491; *U. S. v. Mo., etc., Ry.*, 141 U. S., 358, 369; *U. S. v. S. P. R. R. Co.*, 146 U. S., 570, 598, 606; *U. S. v. N. P. R. R.*, 152 U. S., 284, 298; *S. P. R. R. Co. v. U. S.*, 168 U. S., 1.)

CASES.

Missouri, Kansas and Texas Ry. Co. v. Kansas Pacific Ry. Co., 97 U. S., 491; 1878; Field, J.

Controversy between two railway companies for land in Kansas claimed under grants from the United States.

The grant to the Kansas Pacific was made July 3, 1862, amended July 2, 1864, supplemented July 3, 1866. *Map of general route* was filed prior to December 1, 1866, and in January, 1867, the road was completed for 25 miles, approved by the commissioners, and accepted by the President.

The grant to the Missouri, Kansas and Texas was made July 26, 1866. This grant was accepted by the

company in August, 1866, and in September the line was surveyed and a map of its route prepared; in December, 1866, it was filed in the office of the Secretary of the Interior. In March, 1867, the adjacent lands were withdrawn, and in June, 1870, the line completed and accepted.

Held: That at the time of the grant to the M., K. & T. the title to the land covered by the previous grant to the K. P. had already passed from the United States. The reservations in the K. P. grant did not except from its operations any land for the purpose of afterwards granting it to aid in the construction of any other road.

Page 496:

The act of July 1, 1862, passed to the company a present interest in the lands to be designated within the limits there specified. Its language is "that there be and is hereby granted" to it the odd sections mentioned—words which import a grant *in presenti* and not *in futuro*, or the promise of a grant. Similar terms in other acts of Congress granting lands have uniformly received this interpretation, unless accompanied with clauses restraining their operation. They were so interpreted in *Schulenberg v. Harri-man*, after full consideration of previous adjudications on their import; and the ruling there was followed in *Leavenworth, Lawrence and Galveston Railroad Co. v. United States* (92 U. S., 733). It is true that the route of the road, in this case as in those cases, to aid in the construction of which the act was passed, was to be afterwards designated; and until designated, the title could not attach to any specific tracts. The grant was of sections to be afterwards located, and their location depended upon the route to be established; when that was settled,

the location became certain, and the title that was previously imperfect acquired precision, and attached to the lands.

It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this as in all other cases to the legislative will.

As to the intent of Congress in the grant to the plaintiff there can be no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route without reservation of rights, except such as were specifically mentioned, the location of the route being left, within certain general limits, to the action of the plaintiff. When the location was made and the sections granted ascertained, the title of the plaintiff took effect by relation as of the date of the act, except as to the reservations mentioned, the act having the same operation upon the sections as if they had been specifically described in it. It is true that the act of 1864 enlarged the grant of 1862, but this was done, not by words of a new and additional grant, but by a change of words in the original act, substituting for those there used words of larger import. This mode was evidently adopted that the grant might be treated as if thus

made originally, and therefore, as against the United States, the title of the plaintiff to the enlarged quantity, with the exceptions stated, must be considered as taking effect equally with the title to the less quantity, as of the date of the first act. (*United States v. Burlington and Missouri Railroad Co.*, 4 Dill., 305.)

The construction thus given to the grant in this case is, of course, applicable to all similar Congressional grants, and there is a vast number of them; and it will tend, we think, to prevent controversies between the grantees and those claiming under them respecting the title to the lands covered by their several grants, and put an end to struggles to encroach upon the rights of others by securing an earlier location.

Again, bottom page 498:

The grant was made in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specially withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands, or mineral lands the sale of which was then against the general policy of the Government. It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads.

Bottom page 500:

Upon the principle already announced, in considering the time when the grant to the plaintiff took effect, the title of the defendant to the lands thus set apart to it, had there been no previous disposition or reservation of them, would have become

perfect, and by relation have vested from the date of the act. But so far as the lands were identical with those covered by the previous grant to the plaintiff by the acts of 1862 and 1864, the title could not attach, as it had already passed from the Government.

St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S., 1; March 2, 1891; Field, J.

Suit to establish the right of the Northern Pacific to land in Minnesota, claimed under the act of July 2, 1864. After quoting the provisions of the first, third, fourth, and sixth sections of the act, Mr. Justice Field says (p. 5):

As seen by the terms of the third section of the act, the grant is one *in presenti*; that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preemption, or other disposition previous to the time the definite route of the road is fixed. The language of the statute is "that there be, and hereby is, granted" to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.

The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed

one *in presenti*; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. (*Schuldenberg v. Harri-man*, 21 Wall., 44, 60; *Leavenworth, Lawrence, &c., Railroad Co. v. United States*, 92 U. S., 733; *Missouri, Kansas, &c., Railway Co. v. Kansas Pacific Railway Co.*, 97 U. S., 491; *Railroad Co. v. Baldwin*, 103 U. S., 426.) The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of *Rice v. Railroad Co.*, (1 Black, 358); but unless qualified they are to receive the interpretation mentioned.

United States v. Southern Pacific R. R. Co., 146 U. S., 570; December 12, 1892; Brewer, J.

On July 27, 1866, Congress granted lands to the Atlantic and Pacific Railroad Company. The grant is one *in presenti*, with the same limitation contained in the Northern Pacific grant, as follows:

Whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office.

On March 3, 1871, Congress made a grant to the Southern Pacific Railroad Company.

Under the act of 1866 the Atlantic and Pacific constructed a part of its road, but did no work west of the Colorado River. It did, however, file maps of that

which it claimed to be its line of definite location from the Colorado River to the Pacific Ocean, which, on April 11, and August 15, 1872, were accepted and approved.

On July 6, 1886, Congress passed an act forfeiting certain lands granted to the Atlantic and Pacific, including the lands in controversy.

On April 3, 1871, a month after the grant to the Southern Pacific Railroad Company, that company filed a map of its route and proceeded to construct its road, finishing the same during the year 1878. Its road crossed the line, as located, of the Atlantic and Pacific Company. The lands in controversy are within the grant or place limits of both the Atlantic and Pacific and Southern Pacific at the place where these lines cross.

As the Atlantic and Pacific did not construct its line, and as its rights were subsequently forfeited, and as the Southern Pacific did construct its line, the latter claimed that by virtue of its grant and the construction of its road these lands became its property.

Held: The grant of land made to the Atlantic and Pacific in 1866 and the grant to the Southern Pacific in 1871 were grants *in presenti* which, when maps of definite location were filed and approved, took effect, by relation, as of the dates of the respective statutes.

Page 592:

The contention of the Government is that these lands were not included within the grant to the Southern Pacific. Such contention implies no want of good faith on its part. It is not attempting to take back or forfeit that which it has once granted. It is only seeking, a difference of opinion having

arisen, an adjustment, a determination of the extent of its grant. Less than that could not be expected; more than that could not be asked of it.

Page 597 :

So the question is whether the filing a map of definite location from the Colorado River through San Buenaventura, to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado River to San Buenaventura, the latter point being the limit of the grant. We think, unquestionably, it is. Though a party claims more than he is legally entitled to, his claim ought not to be rejected for that to which he has a right. The purpose of filing a map of definite location is to enable the Land Department to designate the lands passing under the grant, and when a map of such a line is filed full information is given, and, so far as that line may legally extend, the law perfects the title. It surely can not be that a company must determine at its peril the extent to which its grant may go, or that a mistake in such determination works a forfeiture of all its rights to lands.

Page 597 :

Illy as it may accord with the common-law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act and to the company having priority of grant, and therefore that in the eye of the law it is now as though there never was a period of time during which any title

to these lands was in the Southern Pacific. Citing *M., K. & T. Ry. v. K. P. Ry.*, 97 U. S., 491, 497.

Page 606:

The intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands, and therefore grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands. The question is asked, Supposing the Atlantic and Pacific Company had never located its line west of the Colorado River, would not these lands have passed to the Southern Pacific Company under its grant? Very likely that may be so. The language of the Southern Pacific Company's grant is broad enough to include all land along its line, and if the grant to the Atlantic and Pacific Company had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Company.

But that is a matter of result from the happening of something neither intended nor expected. While it may have been within the knowledge of Congress as among the possibilities, that result was not the purpose sought to be accomplished by this legislation. If any other than the general rule as to land grants had been intended, it is to be expected that such intention would have been clearly expressed. So when intent is to be considered, the question is whether Congress intended, the title having once vested in the Atlantic and Pacific, that the Southern Pacific Company should stand waiting to take the lands at some future time, however distant, when the Atlantic and Pacific Company's title should fail.

Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with the right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they should be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach and a forfeiture for its own benefit.

United States v. Northern Pacific R. R. Co., 152 U. S., 284; March 5, 1894; Harlan, J.

Action to recover value of lumber made from logs cut in 1886 from public lands in Washington Territory. Submitted on following stipulated facts:

By the act of July 2, 1864, the Northern Pacific Railroad Company was incorporated, with authority to construct a line beginning on Lake Superior, thence westerly by the most eligible route north of the forty-fifth degree of latitude to some point on Puget Sound, "with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than 300 miles from its western terminus." The

act granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 sections per mile, on each side of its line, through the Territories, and 10 sections per mile through the States, upon the conditions stated in the act.

On March 6, 1865, Josiah Perham, president of the road, forwarded to the Secretary of the Interior for filing a map of the general line of the railroad from a point on Lake Superior to a point on Puget Sound via Columbia River, and requested that the granted lands along that route be withdrawn from sale.

By a joint resolution approved April 10, 1869, Congress authorized the Northern Pacific Railroad Company to extend its branch line from a point at or near Portland to some suitable point on Puget Sound, and also to connect the same with its main line west of the Cascade Mountains. The company was not to be entitled to any subsidy or additional lands in respect to such extension, except lands included in the right of way.

On May 4, 1870, Congress made a grant to the Oregon Central Railroad Company, to aid in the construction of a railroad from Portland to Astoria.

On January 31, 1872, the Oregon Central filed its map of definite location.

On May 31, 1870, Congress by a joint resolution authorized the Northern Pacific to mortgage its road and also to locate and construct its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the

Cascade Mountains to Puget Sound. A grant of additional land was included in this resolution.

On August 13, 1870, the Northern Pacific filed another map, showing the general route of its main line from a point on Puget Sound, following almost identically the same route as that indicated on the map filed March 6, 1865; and on August 13, 1870, 20 sections of land per mile on each side of the line were withdrawn from sale for the benefit of the company.

On September 13, 1873, the company filed its map of definite location of the line from Kalama to Tenino, in Washington Territory, a distance of 65 miles. No road has been constructed by the company down the Columbia River. But during the years 1871, 1872, and 1873 it constructed its line from Kalama, on the Columbia River, in a northerly direction to Tenino, forming a portion of a direct line since that time extended and completed to Puget Sound at Tacoma, the western terminus of the Northern Pacific. The road from Tacoma to Portland runs for about one-half of the distance up the valley of the Columbia River to the last-named point.

The land from which the logs were cut lies north of the forty-fifth degree, within 20 miles of the line indicated upon the map filed January 31, 1872, by the Oregon Central, is within 40 miles of the line selected by the Northern Pacific on the main line of its road from Lake Superior to Puget Sound, as indicated upon the Perham map, filed March 6, 1865, as well as of the line selected by it after the passage of the joint resolution of May 31, 1870, as indicated upon the map filed August 13, 1870.

By the act of January 31, 1885, Congress forfeited to the United States and restored to the public domain so much of the lands granted to the Oregon Central as were adjacent to the uncompleted portions of that company's road. The land in question was adjacent to such uncompleted portions.

Held: The act of July 2, 1864, did not contain a grant of lands in aid of the construction by the Northern Pacific of a railroad from Portland to Puget Sound.

The joint resolution of May 31, 1870, was not simply a recognition by Congress of an existing right in the company to locate and construct a road from Portland to Puget Sound, but, on the contrary, should be regarded as giving a subsidy of lands in aid of the construction of the new road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound (p. 298).

So that the rights of the Oregon Central Railroad Company, whose grant preceded that to the Northern Pacific Railroad Company of May 31, 1870, by nearly two months, attached as of the date of its grant, although the latter company filed a map of general route before the former filed a map of definite location. The lands in question had been disposed of by the United States prior to the passage of the joint resolution of May 31, 1870, namely, by the act of May 4, 1870, granting lands to the Oregon Central Railroad Company in aid of the construction of its road. And as they were embraced by the latter grant, and were not included in any other grant then existing, they were not public lands within the meaning of the grant of May 31, 1870, to the Northern Pacific Railroad Company,

and were, consequently, excepted out of that grant as having been previously disposed of by the United States. (P. 297.)

The lands here in question were disposed of by the United States after the passage of the act of 1864 and before the passage of the joint resolution of May 31, 1870; for they are within 20 miles of the line of the Oregon Central Railroad Company, as shown on its map of definite location, filed January 31, 1872, and based upon the grant to it of May 4, 1870. * * * It is well settled that, in respect to the public lands within at least common granted or primary limits, priority of grant, not priority of location, determines the question of ownership as between parties claiming the same lands under different grants. (*M., K. and T. Ry. v. K. P. Ry.*, 97 U. S., 491; *U. S. v. Missouri, etc., Ry.*, 141 U. S., 358, 369; *U. S. v. S. P. R. R.*, 146 U. S., 570, 598, 606.) (P. 298.)

XII.

The forfeiture of the Northern Pacific grant was not for the benefit of the Oregon and California, but for the benefit of the Government. If these lands were in any way reserved or set aside for the benefit of the Northern Pacific, the act of forfeiture restored them to the public domain.

The act of forfeiture of September 29, 1890 (26 Stats., 426), itself provides (sec. 6) "that no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress," etc.

This provision is in accordance with the general rule that the question whether a grant shall be forfeited or

not is one between the grantor and the grantee. If the grant is forfeited, the forfeiture ordinarily inures to the benefit of the grantor, and not to the benefit of a third party.

In the case of *Van Wyck v. Knevals* (106 U. S., 362), Mr. Justice Field, speaking for the court, says (p. 368):

The right of the company to the remaining odd-numbered sections adjoining the road completed and accepted, not reserved, is equally clear. If the whole of the proposed road has not been completed, any forfeiture consequent thereon can be asserted only by the grantor, the United States, through judicial proceedings or through the action of Congress. (*Schulenberg v. Harriman*, 21 Wall., 44.) A third party can not take upon himself to enforce conditions attached to the grant when the Government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the Government has been treated with respect to the property.

In the case of *United States v. Southern Pacific Railroad* (146 U. S., 570), Mr. Justice Brewer, speaking for the court, says (bottom p. 606):

Again, there can be no question, under the authorities heretofore cited that, if the act of forfeiture had not been passed by Congress the Atlantic and Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be re-

stored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of the condition subsequent, it elected to enforce a forfeiture for that breach and a forfeiture for its own benefit.

These words, *mutatis mutandis*, apply to the case before the court. But for the forfeiture of 1890 the Northern Pacific could yet construct its road and earn these lands. No power but that of Congress could interfere with this right of the Northern Pacific. Congress has interfered, but it interfered for the benefit of the United States, not for the benefit of the Oregon and California. It restored these lands to the public domain.

In *United States v. Northern Pacific R. R. Co.* (152 U. S., 284), Mr. Justice Harlan, speaking for the court, said (p. 298):

When, therefore, Congress, by the act of 1885, forfeited to the United States and restored to the public domain so much of the lands granted by the act of May 4, 1870, for the benefit of the Oregon Central Railroad Company, as were adjacent to and coterminous with the uncompleted portions of the road, the United States was reinvested with the title for its own benefit exclusively. And the title did not pass to the Northern Pacific Railroad Company by reason of the failure of the Oregon Central Railroad Company to construct its road, or because of the subsequent forfeiture of the latter's rights by the act of 1885. The restoration to the public domain

of the lands so forfeited took from the Northern Pacific Railroad Company no lands granted to it by the act of 1870.

XIII.

The forfeiture act of September 29, 1890, contains convincing proof that Congress believed that the Northern Pacific had acquired title to these lands, because it confirmed to the city of Portland rights conveyed to it by the Northern Pacific in lands forfeited by this act.

The act of forfeiture, in the first section, provides "that there is hereby forfeited to the United States, and the United States hereby resumes the title to, all lands heretofore granted, etc.; and all such lands are declared to be a part of the public domain "

The fifth section provides "that if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the Harrison line, being a line drawn from Wallula, Wash., easterly, etc., all persons who had acquired in good faith the title of the Northern Pacific to such lands prior to July 1, 1885, or at that date were in possession under contract with the company, shall be entitled to purchase such lands from the United States at the rate of \$2.50 per acre."

This section contains the proviso "that the right of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company, by deed of August 8, 1886," in a strip of land 50 feet wide (which

is described, and which is a portion of the lands in dispute) "forfeited by this act are hereby confirmed unto the said city of Portland."

XIV.

The forfeiture declared by the act of September 29, 1870, in any event must be held to apply to such of the lands in suit as are within the secondary or indemnity belt of the Oregon and California grant.

Within such belt no title passes until selection of the lands is made by the Secretary of the Interior. This is a familiar rule of construction repeatedly announced by this court (*Ryan v. Railroad Co.*, 99 U. S., 382, 386; *St. Paul, etc., R. R. v. Winona, etc., R. R.*, 112 U. S., 720, 731; *Sioux City, etc., R. R. v. Chicago, etc., R. R.*, 117 U. S., 406, 408; *Barney v. Winona, etc., R. R.*, 117 U. S., 228, 232; *Wisconsin Central R. R. v. Price County*, 133 U. S., 496).

In the present case, whatever be held to be the effect of the filing of the maps of 1865, it must be clear that these indemnity lands were at least put in reservation by reason of the filing of the map of August 13, 1870, and so remained until their restoration by reason of the act of forfeiture. Prior to the filing of the map of 1870 no ~~selection~~ had been made of the lands within said indemnity belt by the Secretary of the Interior, on account of the Oregon and California grant, and the patents, so far as they embraced lands falling within such indemnity belt, issued after the filing of the maps of 1870, were clearly void.

CONCLUSION.

While the decisions of the Secretary of the Interior are not authoritative, yet as to questions involving title to public lands they are entitled to and always have been accorded great respect by the courts. In this connection, therefore, I respectfully call the court's attention to the letter of Secretary Noble to the Commissioner of the General Land Office, dated February 17, 1892. (14 Land Dec. 187, printed in the appendix.) The arguments presented to the court were laid before the Secretary in connection with the protest of the Oregon and California against the decision of the Commissioner of the General Land Office, holding these lands forfeited by the act of September 29, 1890, and were overruled.

The decision of the circuit court of appeals should be reversed and the case remanded, with instructions to affirm the judgment of the circuit court.

JOHN K. RICHARDS,
Solicitor General.

APRIL 3, 1899.

APPENDIX.

ABSTRACT OF OPINIONS OF JUDGES BELOW.

OPINION OF JUDGE GILBERT ON THE DEMURRER (RECORD, PAGES 21 TO 29).

After stating the case, Judge Gilbert first disposes of the contention that the act of July 2, 1864, only granted land in aid of the main line, and not in aid of the branch line via the valley of the Columbia River. He says (bottom p. 23):

The act authorized the company to build and operate a continuous road, "beginning at Lake Superior and running thence westerly to some point on Puget Sound, with a branch line via the Columbia River Valley to Portland." It then granted to the company permission to take material in the construction of "said road" from the public lands adjacent thereto, and gave a right of way upon public lands two hundred feet "on each side of said railroad." It granted lands in aid of the construction, and the grant extends to lands on each side of "said railroad line," and makes the further provision that as soon as the general route is fixed the President shall cause the granted lands to be surveyed for forty miles on both sides of "the entire line." Throughout the act the reference is to the road with its branches, as a single line or road. In the words of the act, the grant of land is coextensive with the grants of right of way and the grant of other privileges.

The proposition that the lands came within the exception of the Northern Pacific grant as "granted" lands, because of the subsequent grant to the Oregon and California and the definite location thereunder, is next considered and overruled upon the authority of *Missouri, etc., Ry. Co. v. Kansas Pacific Ry. Co.*, 97 U. S., 498, and *St. P. & P. R. R. Co. v. N. P. R. R. Co.*, 139 U. S., 17.

The court then takes up the effect of the Northern Pacific grant, and the filing of the Perham map, in taking these lands out of the category of public lands subject to the grant of 1866 to the Oregon and California. The ground is taken that the Perham map was a map of general route, and a legislative withdrawal took place upon its filing.

The court holds strongly against the point that the resolution of May 21, 1870, superseded the grant of July 2, 1864. The map of August 13, 1870, is described as "a map of definite location," which in all respects complied with the act. The judge then says (bottom p. 28):

In the view I take of the law it would make no difference with the rights of the parties to this suit if the Perham map had not been filed. The grant to the Northern Pacific being prior in date to the grant to the Oregon and California, and the reservation of granted lands from the first grant being held not to refer to lands subsequently granted in aid of another road, the first grant remained prior and superior to the second, and there could be no reversal of the order of their priority, resulting either from the fact that the grantee, under the

junior grant, filed its map of definite location and constructed a portion of its road before any map was filed of the line of road under the older grant, or from the further fact that in the final construction of the Northern Pacific road no portion thereof was established upon the line either of the Perham map or the map of 1870. Congress did not offer these lands to the competition of the two companies, and it was not the intention that the more diligent of the two corporations should secure them.

I hold that the failure of the Northern Pacific to construct its road by way of the Columbia River Valley, the forfeiture of its grant therefor declared by Congress in 1890, and the construction by the Oregon and California Company of its road in apt time under its grant of July, 1866, are all matters foreign to the question under consideration. The fact remains that the lands in controversy were granted lands at the time the grant to the Oregon and California Company took effect. They were, therefore, not the subject of the grant to that company. When that grant was made the beneficiary thereof had full notice of the prior grant, and had reason to understand that the lands so devoted to aid the construction of the other road were not within the purview of its own grant, and were not promised it by the United States.

OPINION OF JUDGE GILBERT ON THE MERITS
(RECORD, PP. 63-69).

After stating that upon the proofs it had been shown that the map of August 13, 1870, was not a map of definite location, but of general route, the court considers the contention that the lands were never taken from the public domain by the grant to the Northern Pacific, for

the reason that there was no definite location, and therefore no title ever vested. The court describes the character of the valley of the Columbia River, along which the branch line, described in the grant of 1864, was to be constructed, saying (Record, bottom p. 64):

It is evident, however, that the valley of the Columbia River, for a large portion of the route which would necessarily be covered by such a branch line, is so narrow that the road must have followed either the north or the south bank of the river, and it will not be disputed that a road built in compliance with the terms of the grant, and on the line therein defined, would have been confined to a narrow strip of territory.

The view is taken that it is not necessary that the title pass in order that the lands be segregated from the public domain and excepted from the operation of the junior grant.

It was such segregation to set apart a larger area within which the lands granted to the Northern Pacific Company were to be selected by it. (Record, p. 65; citing *Bardon v. N. P. R. R. Co.*, 145 U. S., 538; *Wilcox v. Jackson*, 13 Pet., 513; *Carr v. Quigley*, 149 U. S., 652; *Norhall v. Sanger*, 92 U. S., 761; *U. S. v. McLaughlin*, 127 U. S., 449.)

The case of *Carr v. Quigley* is distinguished upon the ground that there the Government had the right of selection, here the railroad company, the Northern Pacific.

The United States had not the right to locate the lands granted to aid the Northern Pacific Railroad Company. The grant to that company carried to the grantee the right to make selection of the granted lands. It might definitely locate its line

in good faith, in compliance with the requirement of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. It is unimportant that the company never exercised this power. The right was established by the act and it still subsisted when Congress, by a later grant, bestowed lands in aid of the construction of the Oregon and California Railroad. (Record, p. 67.)

The court again discusses and upholds the sufficiency of the Perham map as a map of general route by the filing of which a legislative withdrawal took place. Upon the point that the Perham map was defective because the line down the Columbia Valley was extended to Puget Sound, and thus appeared to be a main line instead of a branch, the court says (bottom p. 68):

So far as the map locates the road west of the Rocky Mountains, it complies strictly with the terms of the act, with the exception that the line by the Columbia River Valley, instead of ending at a point at or near Portland, proceeds farther and ends at the waters of Puget Sound. The fact that the construction of a road from Portland to Puget Sound was not authorized by the grant does not impair the validity of the location of that part of the road which was authorized and which was located in compliance with its terms; and it is immaterial that the main line and the branch line are not so respectively designated upon the map. They are in the location called for by the language of the granting act, and it will be presumed that they are located in pursuance thereof. This map had been on file for more than a year when the grant to the Oregon and California Railroad was made, and it not only furnishes evidence of the location of the general route

of the line of the Northern Pacific branch line, and of the consequent segregation of those lands from the public lands by operation of law, but it was notice to the Oregon and California Railroad Company of the prior grant and the prior bestowal of these lands in aid of another road.

In conclusion, the court calls attention to the fact that if the map of 1865 was ineffective to accomplish the withdrawal, the map of 1870 was open to no such objection. Upon it an actual withdrawal was made. This sufficiently identified the lands covered by the Northern Pacific grant of 1864. It was true that the Northern Pacific still retained the right to change its line, "but until such final map was filed, the map of general route, whereby the withdrawal was in fact accomplished, served to sufficiently identify the granted lands, notwithstanding the reserved right to alter its location. In the absence of such map of final location, and until the same is filed, it is a reasonable presumption that the granted lands are those which have been withdrawn in pursuance of the filings of the map of general route, as required under the terms of the grant."

MAJORITY OPINION OF ROSS, C. J., AND HAWLEY, D. J.
(RECORD, PP. 168-175).

After a statement of the case, in the course of which (Record, p. 170) Judge Ross states that the rejection of the Perham map was "acquiesced in" by the Northern Pacific, he concedes (Record, p. 172) that the forfeiture of 1890 was for the benefit of the Government alone, and then states the real question, namely, "Did the lands in

question ever become affected by any grant to the Northern Pacific Railroad Company?"

The map of August 13, 1870, is treated as having no bearing whatever upon the case, because it was filed under the resolution of 1870, which contained a new grant, and did not embrace any public land disposed of after the grant of July 2, 1864. After this summary disposition of an important branch of the case, the court says that the only thing which could take the lands out of the mass of public land to which the Oregon and California grant applied was the grant of July 2, 1864, and the Perham map filed thereunder.

The Perham map is held ineffective because it purports to designate a route from Lake Superior, via the valley of the Columbia, to Puget Sound—a line not authorized by the grant—and because it was too indefinite, being for that reason rejected by the Land Department.

The Perham map having no effect, these lands remained public lands, subject to the Oregon and California grant, unless the Northern Pacific grant of 1864 in itself operated to withdraw them. This can not be maintained without holding that all the immense belt north of the forty-fifth degree of latitude was withdrawn by the Northern Pacific grant of 1864. Moreover, the very grant of July 2, 1864, in express terms declared that it embraced only public land not granted or otherwise appropriated and free from all claims "at the time its line of road was definitely fixed and a plat thereof filed." Until the grantee thus identifies the lands embraced by the grant there is nothing to segregate any particular land from

the mass of public lands. Under the circumstances the Northern Pacific grant of 1864 never took effect so far as these lands are concerned, and so they remained public lands at the time of the Oregon and California grant.

DISSENTING OPINION OF MR. JUSTICE MCKENNA, THEN
SITTING AS C. J. (RECORD, pp. 176-183).

The contention that the grant to the Oregon and California is within the reservations of the grant to the Northern Pacific is disposed of adversely upon the authority of *M., K. & T. Ry. v. K. P. Ry.*, 97 U. S., 491, and *St. P. & P. R. R. Co. v. N. P. R. R. Co.*, 139 U. S., 1, the case of *U. S. v. N. P. R. R. Co.*, 152 U. S., 284, being distinguished.

What is regarded as the real question is then discussed, namely, "Did the grant to the Northern Pacific Company by the act of 1864 amount to such an appropriation of the lands in controversy as to preclude them from the operation of the grant to the Oregon and California road by the act of 1866?" This is done without regard to the Perham map or the map of August 13, 1870, the view being expressed that these maps have no bearing upon the question to be determined. The principles to be followed in deciding between conflicting railroad land grants are thus broadly stated (Record, top p. 179):

Many phases of railroad land-grant cases have been presented to the Supreme Court and have been so firmly established as to become postulates. These are that grants of that kind are grants in praesenti in the nature of a float; that they do not attach to specific sections until identification by a map of definite location of the road; that within what has been called

“common granted or primary limits” the date of the grant is the determinative fact in contending railroad grants, not the date of location, giving, if prior, priority of right; if, at the same time, equality of right—that is, giving the land in equal undivided moieties—in neither case can an advantage be secured by priority of location or of construction; that the condition of building the road is a condition subsequent, and right and grant continuing until forfeiture by or entry by the United States, and that the forfeiture or entry, in the absence of explicit legislative declaration, is for the benefit of the United States, not for the benefit of the subsequent grantees.

The suggestion by the majority that the application of these principles would result in the withdrawal under the Northern Pacific grant of 1864 of all lands north of the forty-fifth degree of latitude is not regarded as embarrassing. (Record, middle p. 179):

To what is it embarrassing? To settlers? To the occupation and development of the country under the land laws? Not at all. This is prevented by the reservations in the grant. To other railroad companies? Grants to these was not a constant but an occasional policy, and dependent so much upon special circumstances as to require (certainly not necessarily to exclude) a right of selection of route in a wide territory. If this was to be primarily guarded against or to be afterwards corrected, the remedy was in Congress, and obvious.

Attention is called to the fact, however, that it does not follow that all these lands would be withdrawn. The grant indicates a route within its limits. What this court said in *U. S. v. N. P. R. R. Co.* (152 U. S.), is

quoted. The rights conferred by a railroad grant are thus clearly defined (Record, middle p. 180):

I have said, as to contesting railroad grants, we do not regard maps, either of general route or of definite location, but only the date of the grants and the rights conveyed by them. What rights are conveyed by them? There are two, one ultimate and the other provisional. The ultimate one gives a title to a certain number (twenty in the Territories, ten in the States) of specified sections. The provisional gives a power of selection of these from a wider extent of territory. Is it not a substantial and necessary right? May it exist in fullness and with power to exercise in two railroad companies at the same time? Manifestly not. May it exist in them in succession, or, rather, suspended in one until default in the other? If so, when comes default, and how?

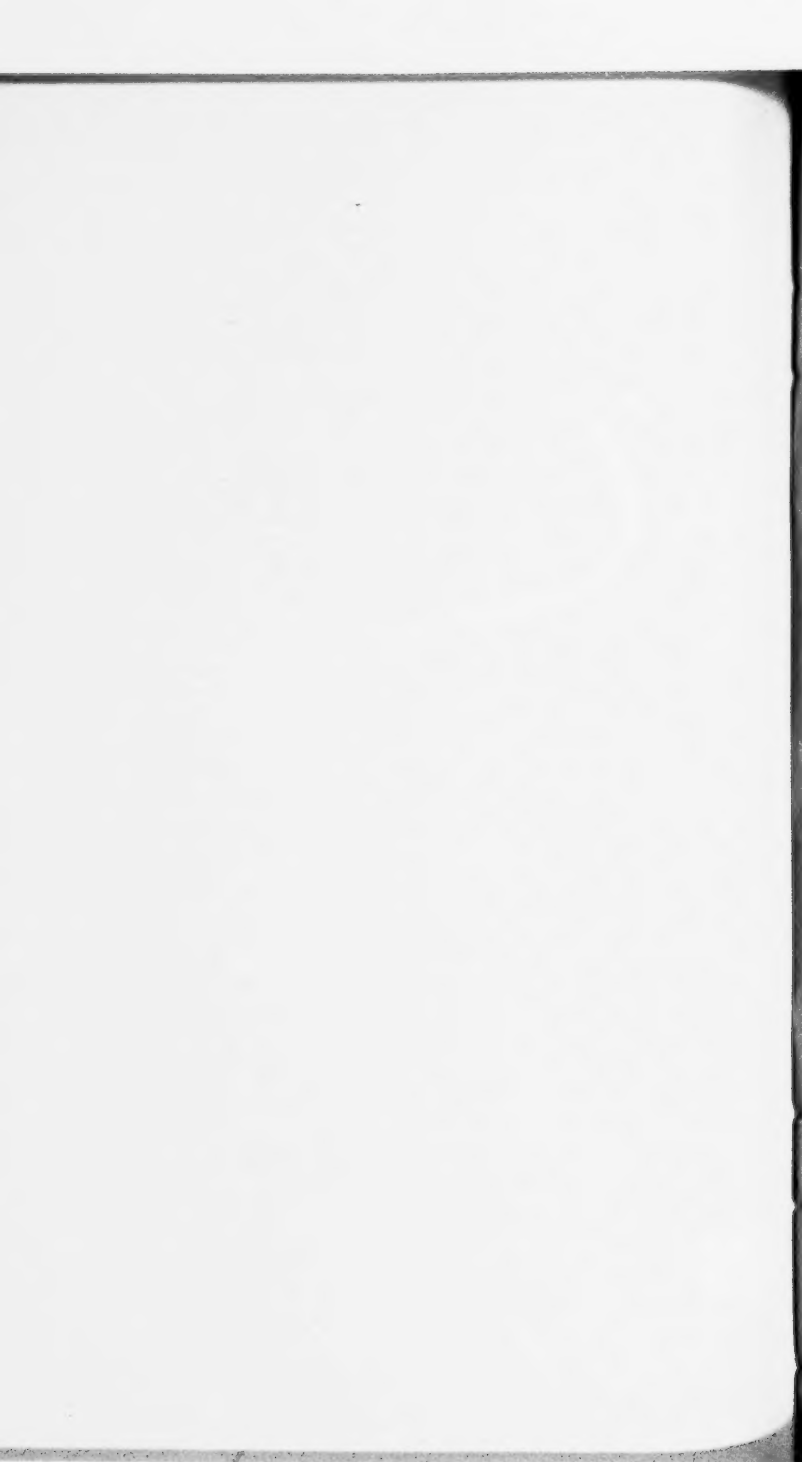
Mr. Justice McKenna then comments upon the case of the *United States v. Southern Pacific Railroad* (146 U. S., 590), dwelling specially on the following language of the court (Record, bottom p. 181, p. 183):

Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and constructing it, its title to these lands would have become perfected. No power but that of Congress could interfere with the right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent.

The impossibility of recognizing the right of the Oregon and California to these lands without violating

the right of the Northern Pacific, under the act of 1864, to locate its road and acquire these lands is thus forcibly stated (Record, bottom p. 182):

By what, then, did it (the Oregon and California) get rights, and when? Only by its grant, if at all. But at the date of that the right of locating its road so as to take the lands in controversy existed unimpaired in the Northern Pacific Company under the prior grant of 1864, and continued to exist and did exist unimpaired in that company January 29, 1870, when the Oregon and California Company filed its map of definite location; did exist when that company built its road; did exist in 1871 and 1877, when patents were issued to that company. If not, by what was it taken away? Certainly not by any act of the United States, and the United States alone had the power. No act of the Oregon and California Company could do it.



SECRETARY NOBLE TO THE COMMISSIONER OF THE GENERAL
LAND OFFICE, FEBRUARY 17, 1892.

I have considered the protest filed on behalf of the Oregon and California Railroad Company, against so much of the instructions issued by your office, under the forfeiture act of September 29, 1890 (26 Stat., 496), as relates to the lands falling within the conflict, or overlap, of the grants for the Northern Pacific and Oregon and California Railroad Companies, east of Portland, Oregon.

By the act of Congress approved July 2, 1864 (13 Stat., 365), a grant was made to the Northern Pacific Railroad Company, to aid in the construction of a railroad from a point on Lake Superior, in the State of Minnesota, or Wisconsin, westwardly by the most eligible route, to be determined by the company, on a line north of the 45th degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia River, to some point at or near Portland, in the State of Oregon.

The joint resolution of May 31, 1870 (16 Stat., 378), authorized the company to locate and construct "its main line to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound."

It will be seen that the effect of said resolution was to change the branch to main line, and *vice versa*, and also to provide for a land grant for the new line, viz, a connecting piece between Portland, Oregon, and Puget Sound.

The location of the road, as shown upon the map of general route filed and accepted August 13, 1870, follows

the Columbia River from Wallula, Washington, to a point on the north side of the river just opposite to Portland, Oregon. Between Wallula, Washington, and Portland, Oregon, the road was not constructed, and hence comes within the terms of the first section of the forfeiture act, before referred to, which provides:

"That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and continuous with the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: *Provided*, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted."

The protestant claims under the act of Congress approved July 25, 1866 (14 Stat., 239), which provided for the building of a road from Portland, Oregon, to the south boundary of Oregon to connect with the California and Oregon Railroad, and made a grant of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad." It further provided:

"and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands designated as aforesaid shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections."

The Oregon and California Railroad Company filed a map of definite location of its road opposite this land

October 29, 1869, which was accepted by this Department January 29, 1870, upon which withdrawal was ordered, and the road was duly built opposite these lands within the time limited by law for the construction of the road.

Under the rulings in force in the administration of land grants, in this Department, prior to 1878, it was held that priority of location gave priority of right to lands within conflicting limits, and a large number of tracts were patented to the Oregon and California Railroad Company, within the conflict now under consideration.

In your instructions to the register and receiver at Oregon City, Oregon, dated January 19, 1891 (not reported), under the forfeiture act, it was held by you that, east of Portland, Oregon, the grant for the Northern Pacific Railroad Company is under the act of July 2, 1864 (*supra*), which being prior to the act making the grant for the Oregon and California Railroad Company, it follows that the lands embraced within the withdrawal under the 6th section of the act of 1864 were excepted from the latter grant, and by the forfeiture act said lands were restored to the public domain.

The principal grounds on which the protest on behalf of the Oregon and California Railroad Company is based are as follows:

"The Northern Pacific received its authority of law to locate its main line to Portland by the joint resolution of 31st May, 1870, and filed a map of general route 13th August, 1870. It never made a definite location opposite this place where the conflict under discussion exists, and though in the general sense of the forfeiture act of 1890 that company had a grant of lands on that general route, that grant not having been definitely located, it could not now be held that it ever took effect by relation as of the date of the grant, whether the date of the grant be July 2, 1864, or May 31, 1870."

It is further claimed that the joint resolution of 1870 was substantially a new grant of lands within limits to

the extent mentioned in the charter of the company, and excepted therefrom lands included in grants made subsequent to July 2, 1864, and prior to the definite location of the road.

As stated by the company, "The Northern Pacific Company was thus provided with indemnity therefor, if it lost lands because of the grant to the Oregon and California Company which Congress intended to recognize."

It is first necessary to determine which is the prior grant within the conflict referred to, for within conflicting limits neither priority of location nor priority of construction gives priority of right, but in each case the respective rights are determined as of the dates of the acts making the grants. *Missouri, Kansas and Texas Railroad Company v. Kansas Pacific Railroad Company*, 97 U. S., 491; *St. Paul and Sioux City R. R. Co. v. Winona and St. Peter R. R. Co.*, 112 U. S., 720. It is true that in these cases the roads had been definitely located, but it would seem that the reasoning in said cases applies with equal force to the matter under consideration.

It will be remembered that the act of July 2, 1864 (*supra*), provided for the construction by the Northern Pacific Railway Company of a branch line via the valley of the Columbia River to some point at or near Portland, Oregon.

In March, 1865, the president of said company filed in this Department a map of general route of the entire line of the road, showing a location down the Columbia River to a point opposite Portland, and thence north to Puget Sound, and asked that a withdrawal be ordered thereon, which was refused, the same being deemed insufficient.

As held by Attorney-General Garland, in his opinion of January 17, 1888 (8 L. D., 14), "the map thus filed accomplished no good purpose for the company, but afforded the public a general knowledge of probable location of the prospective road."

This was the condition of affairs at the date of the passage of the act of 1866, making the grant for the Oregon and California Company.

The act of 1864 made the location of the grant therein provided for, in this vicinity, reasonably certain, and the location of 1865 imparted additional information upon the subject.

The joint resolution of 1870 merely changed the name of this part of the line, by designating it as the main line, instead of the branch line, but the grant remained under the act of 1864, and the map of general route filed in August, 1870, being accepted by this Department, withdrew the lands under the 6th section of the act of 1864. The section provides:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required in the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act."

It is true that the Northern Pacific Railroad was never definitely located opposite this land, but in view of the requirement in both acts prescribing that the road was to be built *via* the valley of the Columbia River, and of the provision in the sixth section of the act of 1864, that the general route shall be fixed, it would seem that the location of 1870 fixed this grant as against the location upon any other grant subsequent in date to the act of 1864.

In the forfeiture act special provision was made for the disposition of the forfeited lands lying south of the present terminal at Wallula, Washington, and north of what is known as the "Harrison line." When it is remembered that these lands are opposite that portion of the road not definitely located, it is apparent that Congress treated the lands embraced in the withdrawal on general

route for this road as "granted lands," within the meaning of the forfeiture act.

As against the holding of your office, that a moiety of the lands within the conflict, or overlap, of the grants for the main and branch lines of the Northern Pacific Railroad, opposite the unconstructed portion of the main line, was forfeited by the act of September 29, 1890 (*supra*), the Northern Pacific Railroad Company urged that the main line had not been definitely located between Wallula and Portland.

In answer to this contention it was held (11 L. D., 625):

"In the first place, there was a grant along said route which lacked only action on the part of the company to consummate. Furthermore, a reading of the entire act leaves no room to doubt that a forfeiture along said stretch of the main line was contemplated, and the lands so forfeited are described in the first section of the act as 'granted lands.'"

This applies with equal force in the present controversy, and having determined that the grant for the Northern Pacific Railroad Company, east of Portland, Oregon, is under the act of July 2, 1864 (*supra*), the forfeiture declared by the act of September 29, 1890 (*supra*), is to the extent of the withdrawal made under the 6th section of the act of 1864.

It but remains to consider the question as to whether the exception clause in the act making the Northern Pacific grant included grants to aid in the construction of other roads, made subsequent to the passage of said act and prior to the definite location of the road.

This question was considered by the Supreme Court in the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1), and therein it was held,

"We are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Com-

pany was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. *Missouri, Kansas and Texas Railway v. Kansas Pacific Railway* (97 U. S., 491, 498, 499)."

It is clear, had the Northern Pacific Railroad been constructed through this conflict, its right would have been superior to that of the Oregon and California Railroad Company; hence, any claim the latter company may assert in and to these lands must rest upon the act declaring the forfeiture.

The 6th section of that act provides:

"That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided."

I can find no provision in the act under which the Oregon and California Railroad Company would be entitled to these lands, but, on the contrary, the 5th section of the act provides:

"That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the city of Portland with an abundance of good, pure,

and wholesome water over and across the following-described tracts of land: Sections nineteen and thirty-one, in township one south, of range six east; sections twenty-five, thirty-one, thirty-three, and thirty-five, in township one south, of range five east; sections three and five in township two south, of range five east; section one in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five, in township one south, of range four east, of the Willamette meridian in the State of Oregon, forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the above-described sections for the purpose of constructing, maintaining, and repairing a water-pipe line aforesaid."

This pipe line traverses the entire conflict, and had Congress recognized any rights in the Oregon and California Railroad Company, within the conflict, the above provision would not only have been unnecessary, but in conflict with the rights of said company.

From a review of the entire matter, I can see no error in your instructions, and the same will be carried into effect, if heretofore suspended, and as to all lands patented to the Oregon and California Railroad Company, within the conflict, steps should be taken at once looking to their recovery as provided for in the act of March 3, 1887 (24 Stat., 556).

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE OREGON AND CALIFORNIA RAILROAD } No. 52.
Company et al., appellees.

ADDITIONAL POINTS FOR THE UNITED STATES IN
REPLY.

1

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,	} No. 52.
<i>v.</i>	
THE OREGON AND CALIFORNIA RAILROAD Company et al., appellees.	

ADDITIONAL POINTS FOR THE UNITED STATES IN REPLY.

The additional brief for appellees was not read until after the argument. The following suggestions are in reply to it:

I.

The lands both within the granted and indemnity limits were patented to the Oregon and California, because at that time the rule in the Land Department was that priority of location determined priority of right, without regard to the dates of the granting acts. (See memorandum, with letter to register and receiver at Roseburg, Oreg., printed in the appendix.)

II.

I submit a memorandum prepared by the Land Department on the rights of *bona fide* purchasers under recent legislation, showing that a decree of reversal in this case may be so framed as amply to protect the rights of any *bona fide* purchasers from the Oregon and California.

III.

The suggestion that a railroad from Wallula to Portland might be constructed through mountain passes so as to reach Vancouver and Portland while running in a southerly direction, thus making the terminal line at Portland an east and west line, does not help the Oregon and California, because:

1. A line built from Wallula to Vancouver through the Cascade Mountains would not be a line "via the valley of the Columbia River." The Pennsylvania Railroad from Pittsburg to Cincinnati is not a line "via the valley of the Ohio River," although it keeps within the northern watershed of the Ohio River. It crosses the waters of the Muskingum, the Scioto, the Miami, and other tributaries of the Ohio, but it does not run down the Ohio Valley; on the contrary, at Columbus it is over a hundred miles from the Ohio Valley.

2. Even if such a line could be built in compliance with the limitation of the act of 1864, its terminal line at Portland would not be an east and west line. A railroad company can not, by the use of curves and crooks at the end of its railroad, fix the direction of its termi-

nal line to suit itself without regard to the direction of the entire road. I print in the Appendix a memorandum upon this point, with special reference to the cases cited by opposing counsel.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 17, 1899.

APPENDIX.

INDEMNITY LANDS OF THE OREGON AND CALIFORNIA WITHIN THE OVERLAP.

It might be interesting to the court to know how these lands within the secondary or indemnity belt of the Oregon and California grant and also within the overlap of the Northern Pacific grant via the valley of the Columbia River to a point at or near Portland came to be patented on account of the first-mentioned grant.

The reason is plain when one has a knowledge of the rulings of the Land Department in the matter of the determination of rights under railroad land grants in force at the time of the patenting of these lands. Relative to the respective rights of grantee claimants to the lands within the overlap of their grants, it was the rule of construction prevailing in the Land Department at the time of the issue of these patents that priority of location determined priority of right, without regard to the dates of the acts making the grants. (See following letter to register and receiver at Roseburg, Oreg., relative to a conflict between the Oregon and California Railroad and a prior grant for the Coos Bay wagon road.) This rule prevailed until the decision of this court in the case of the *M., K. and T. R. R. v. K. P. R. R.*, 97 U. S., 491.

It was also held that the rights of the grantee claimant under a railroad land grant attached within the indemnity limits at the same time that its rights became

fixed within the primary or granted limits, and that selection was not necessary in order to attach a right to the lands within the secondary or indemnity belt. (*Swift v. California and Oregon*, 2 Copp's L. L., 733.) This rule prevailed until the decision of this court in the case of *Ryan v. Central Pacific* (99 U. S., 382, 386). See *Blodgett v. California and Oregon* (2 Copp's Land Laws, 814).

Thus, as the Oregon and California Railroad Company was first in filing its map of definite location, administering its grant under the rules above given, the lands within both the primary and secondary or indemnity belt were patented on account of its grant, notwithstanding the fact that they had previously to the patenting of the lands fallen within the reserve made on account of the prior grant for that portion of the Northern Pacific road via the valley of the Columbia River to a point at or near Portland.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington D. C., January 8, 1874.

REGISTER AND RECEIVER,

Roseburg, Oreg.

GENTLEMEN: I am in receipt of your letter of 13th June last, transmitting an appeal from your decision refusing to approve list No. 2, of selections within 3 miles limits of the Coos Bay Wagon Road Company.

You refused to approve the selections because within the limits of the grant to the Oregon and California Railroad Company, holding that the railroad company was entitled to the lands by reason of the priority of their granting act.

I have to state that in accordance with existing rulings of the Department the date of the act does not govern in

cases of this kind, unless authority is found in the granting act to so rule.

It is the date of definite location of the railroad which decides the priority of right.

The lands in controversy lie in townships 27 south, ranges 6 and 7 west, and townships 28 south, ranges 7 and 8 west, aggregating 7,423.52 acres.

The files and records of this office show that the definite location of the Oregon and California Railroad Company to the south line of township 27 south was adopted by the board of directors March 8, 1870, and to the south line of township 30 south, December 10, 1870, and in accordance with present rulings of the Department these dates are taken to be the definite location of the road. The definite location of the Coos Bay wagon-road upon the earth's surface was between September 1 and October 26, 1869, which was prior to the bestowal of the grant by the State.

The State legislature of Oregon, by act of October 22, 1870, designated this company as the beneficiary of the Congressional grant, which, in my opinion, in the absence of proof of any earlier authorized adoption of the line, should be taken as the date when the right of the company attached.

Therefore the Oregon and California Railroad being definitely located to the south line of township 27 south March 8, 1870, the company are entitled to the conflicting lands north of that line, and the right of the Coos Bay Wagon Road Company having attached prior to the definite location of the railroad south of that line, said wagon road company are entitled to the conflicting lands south of the point, and I so hold.

You will notify the officers of both companies of this ruling and allow the usual sixty days for appeal.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

BONA FIDE PURCHASER.

The bill in this case was filed under the provisions of the act of March 3, 1887 (24 Stat., 556), which made due provision for the protection of the interests of *bona fide* purchasers from the company.

That act contemplated that the title erroneously given the company should first be returned to the United States, and upon proof of *bona fide* purchase from the company, provision was made in the fourth section of that act for the issue of a patent by the United States to the purchaser to relate as of the date of his purchase from the company, whereupon demand was to be made of the company for the price of the land.

The act of March 2, 1896 (29 Stat., 42), changes this practice, by providing in its second section—

“That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, *for the value of said land*, which in no case shall be more than the minimum Government price thereof, and *the title of such claimant shall stand confirmed*. An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by THE COURT TO BE A BONA FIDE PURCHASER, the court shall decree A CONFIRMATION OF THE TITLE, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association

of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such *bona fide* purchaser in any United States court having jurisdiction of the subject-matter, or, at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress."

There can be no question but that the title of all *bona fide* purchasers from the Oregon and California Railroad Company stands confirmed under the provisions of that act.

The *bona fide* character of the purchaser must, however, first be established.

In the present case two purchasers were made parties to the bill, but the other persons alleged to have purchased from the company were not made parties, so they have not shown themselves to be *bona fide* purchasers, and this court can take no notice of them. Not being parties to the suit, they will not be affected by a decree therein. Equity Rules 47, 48, and 53.

If they are *bona fide* purchasers, their rights are fully protected under the law, either through a proceeding in the Land Department or in the courts.

In this connection I desire to call the attention of the court to the fact that in the act of 1887, as well as the act of 1896, provision is made for securing to the United States the value of the lands erroneously conveyed on account of the railroad grant, even in the event that the lands erroneously certified or patented had been transferred to a *bona fide* purchaser.

As before stated, this bill was filed under the act of March 3, 1887, and had as its object the restoration of the title to the land in the United States, leaving the

Land Department to adjudicate the rights of purchasers from the railroad company.

It was not attempted, therefore, to establish the value of the lands, nor was a decree against the company for the value of the lands sought.

It is only alleged that less than one-third of the lands in suit have been sold, and a decision upon the questions involved, determining the right of the Oregon and California Railroad Company to the lands in suit under its grant, will in no wise affect the rights of those who purchased from the company in good faith.

The question as to the rights of any of these purchasers has not been passed upon by the lower court, and for the reasons before given no attention should now be given to this claim of *bona fide* purchaser made on behalf of the railroad company.

A decree of reversal could contain such direction to the court below as would amply protect the rights of any *bona fide* purchasers from the company.

TERMINAL LIMIT AT PORTLAND, OREG.

It is contended by counsel for the railroad company that it would have been possible to so locate the line of the Northern Pacific Railroad that a terminal to its grant drawn at Portland, Oreg., would not have included a single acre of the lands here in suit. We submit that no such location was possible, even waiving the question as to whether the proposed location would have been an acceptable one, not being the most direct route nor within the description of the act. It can be surely stated that upon neither of the feasible lines described by the engineer whose testimony appears in this case could a terminal have been drawn excluding the lands here in suit.

The decision of the Land Department referred to by counsel (5 L. D., 468), being the case of *Scott v. Kansas Pacific Railway Company*, involved only the question as to the proper establishment of the lateral limits of the grant, and not the terminal. It is true that upon the diagram illustrating said case terminal lines are shown, which lines it will be found upon examination are drawn at right angles to the last general course or direction of the road. It must be apparent that in drawing terminals to the last course or direction of the road much confusion necessarily results, for the general course or direction may be changed in the last mile or two from the terminus.

To what part of the road, then, must we be limited in fixing the terminal of the line?

In most acts provision is made for the patenting of the lands in sections of 20 or 25 miles, and for the purpose of the patenting of the lands these imaginary terminal lines drawn to these sections would necessarily be perpendicular to, or at right angles with, the road embraced in that section.

When it comes to the fixing of the final terminals at the termini of the road, it must be seen that the general course or direction of the *entire* line must control in fixing these lines.

In the case of *United States v. Burlington and Missouri River Railroad Company* (98 U. S., 334, 339, 340), this court, in considering the locus of the land granted, used the following language: "And the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within limits perpendicular to it at each end."

It will thus be seen that the terminal lines are to be perpendicular to, not a portion of, the road, but the entire road at each end. It is maintained, therefore, that if these feasible lines referred to by the engineer be in the imagination defined upon the map and end at Vancouver, the point at or near Portland, where the map of 1865

ended, the road via the valley of the Columbia River to a point at or near Portland, the terminal line upon each of these locations, including that shown in the map of 1865 or the Perham map, would be identical. If, however, these imaginary lines be extended beyond Vancouver across the river and to the town of Portland, Oreg., a slight change would occur in the angle fixing the terminal line.

A small diagram illustrating the matter has been prepared and is hereto attached, the line A B shown thereon being the terminal heretofore established to the line via the valley of the Columbia River to a point at or near Portland, and the line C D being the terminal line which it is claimed would properly designate the terminal line to this portion of the grant if the imaginary lines be extended into the town of Portland.

THE QUADRANT CASE.

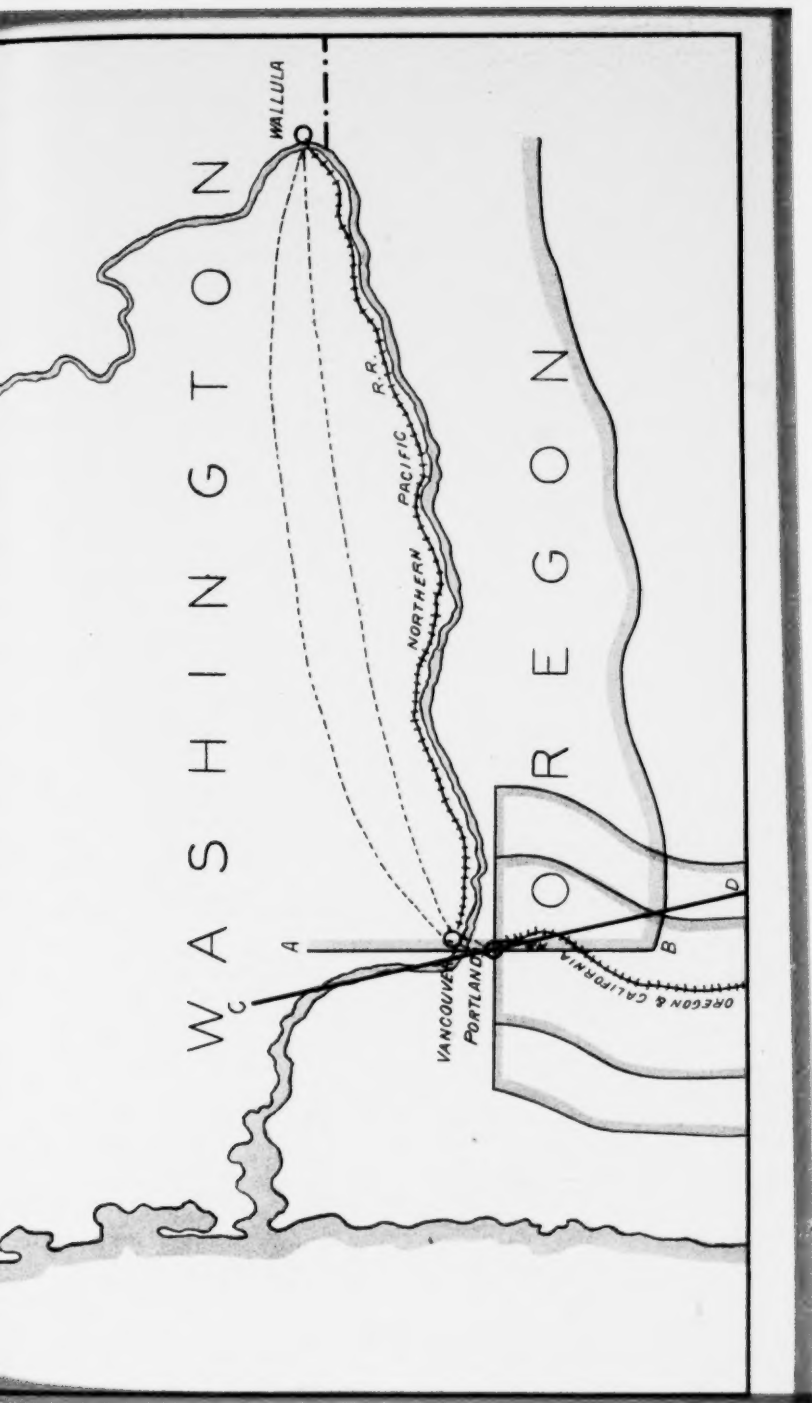
Adverting to the quadrant case which was stated by counsel to control the question as to the proper establishment of terminal lines, it will be seen from an examination of the exhibit in that case that it supports clearly the views contended for on behalf of the United States. In that case two lines of road were built:

(1) From Portland to Forest Grove.

This portion of the road, after leaving Portland, proceeds to the south about $3\frac{1}{2}$ miles, then in a northwesterly direction to Forest Grove.

Upon this road the general direction was taken to be east and west, and the terminals were drawn at right angles or perpendicular to an east-and-west line and parallel to each other.

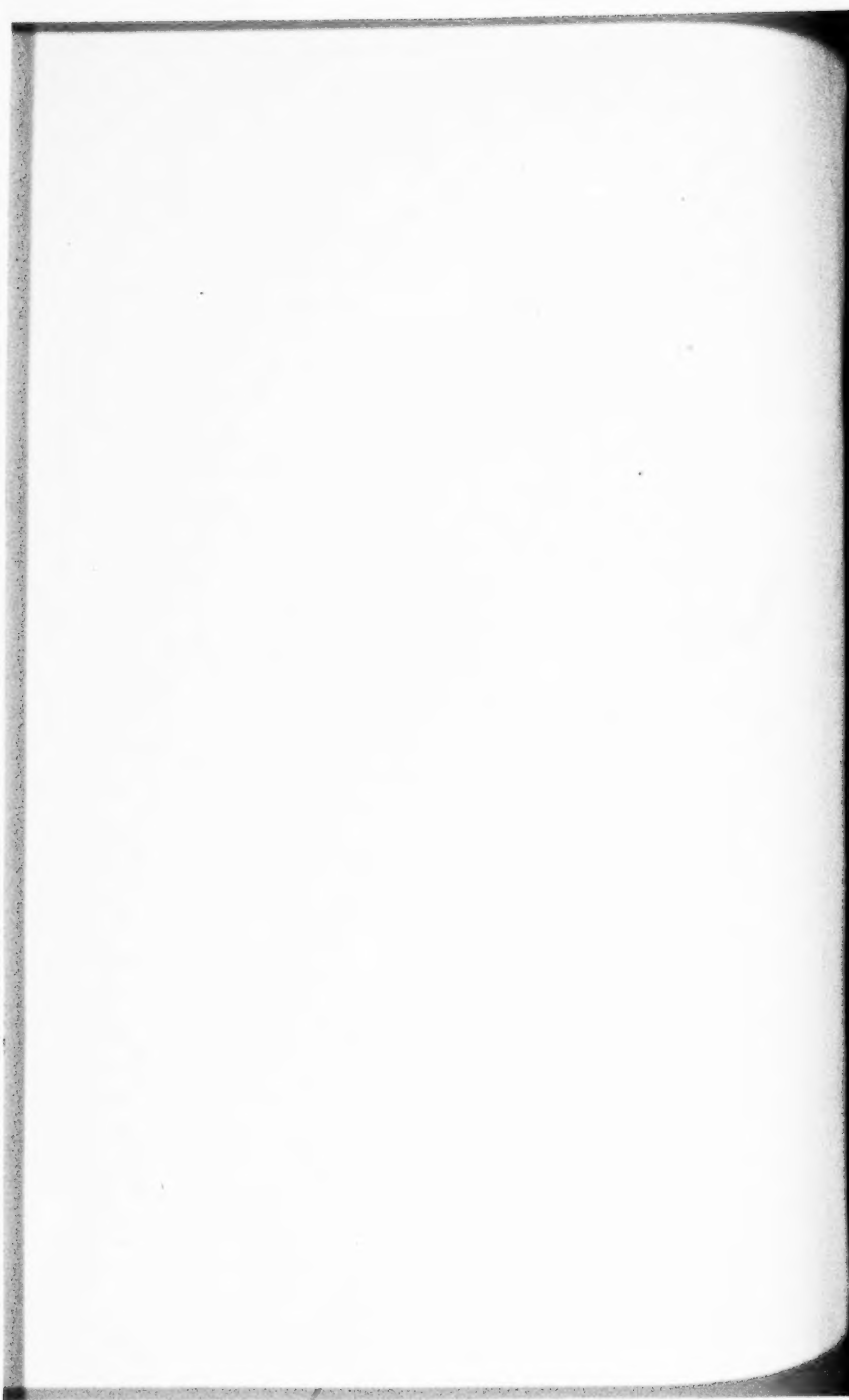
The terminals were not established perpendicular to the last course or direction, but to the *entire* line.





(2) A road from Forest Grove to McMinnville.

This portion of the road leaves Forest Grove in a southwesterly direction, and after a few changes proceeds to McMinnville in a southeasterly direction. On this portion of the road terminals were established upon the entire line, the general course being considered as north and south, so the terminals were established perpendicular to a north and south line and parallel to one another. (See diagram in case *United States v. Oregon and California R. R. Co.*, 164 U. S., 526, 532.)



Supreme Court of the United States

Filed

THE UNITED STATES

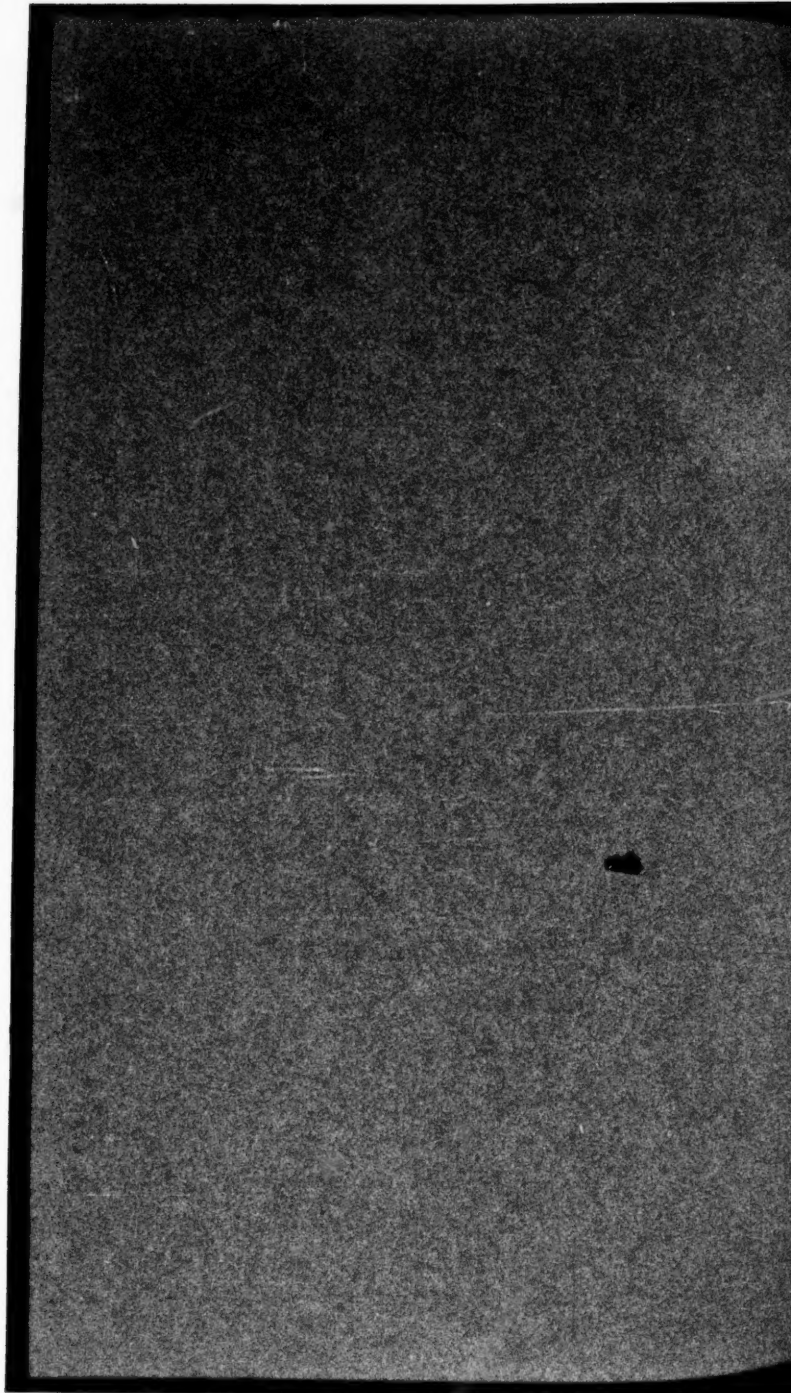
THE OREGON AND CALIFORNIA RAILROAD COMPANY
JOHN A. HUBBARD AND THOMAS L. HUBBARD

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE APPELLERS

JOSEPH E. CHOATE
LEWIS E. PAYSON
CHARLES H. THOMAS

Of Counsel for Appellants



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 52.

THE UNITED STATES,
Appellant,

AGAINST

THE OREGON AND CALIFORNIA
RAILROAD COMPANY, JOHN A.
HURLBURT and THOMAS L.
EVANS,

Appellees.

APPEAL FROM UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLEES.

Statement of Case.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, rendered on October 19, 1896, reversing the decree of the Circuit Court for the District of Oregon and remanding the cause thereto with

directions to the Court below to dismiss the bill (Record, p. 184).

The suit was brought by the United States in February, 1893, in the Circuit Court for the District of Oregon, to obtain a decree for the cancellation of patents issued by the United States to the Oregon and California Railroad Company conveying the lands described in the bill of complaint, and for the cancellation of the instruments purporting to convey the title derived through such patents.

The decree of the Circuit Court for the District of Oregon, rendered on September 9, 1895, which was reversed by the Circuit Court of Appeals, had decreed the cancellation of the several patents described in the bill, and issued by the United States to the Oregon and California Railroad Company on May 9, 1871, July 12, 1871, June 22, 1871, and June 18, 1877, in so far as they purported to convey title to the lands described in the bill, and had adjudged such patents to be null and void, and had decreed that the warranty deed executed February 26, 1880, by the said Railroad Company to the defendant Hurlburt, for a portion of the lands embraced in the bill, be canceled and decreed null and void, and that the

several deeds from the said Railroad Company and the deeds thereunder by which the title of certain other portions of the lands embraced in the bill was finally lodged in the defendant Evans should be canceled and adjudged to be null and void (Record, p. 63).

The lands in suit are situated in the State of Oregon, southeasterly from the City of Portland, and are within the limits of the grant made by the Act of Congress of July 25, 1866 (14 Statutes, 239), to aid in the construction of a railroad from Portland to the southern boundary of the State of Oregon.

THE OREGON AND CALIFORNIA ACT.

The first section of the act authorized the construction of a railroad and telegraph line within the State of Oregon, beginning at the City of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River Valleys to the southern boundary of Oregon.

The granting clause of the act was in Section 2 as follows :

“ SEC. 2. *And be it further enacted*, that
“ there be, and hereby is, granted to the said

" Companies, their successors and assigns,
 " * * * every alternate section of public land,
 " not mineral, designated by odd numbers,
 " to the amount of twenty alternate sections
 " per mile (ten on each side) of said railroad
 " line; and when any of said alternate sections
 " or parts of sections shall be found to have
 " been granted, sold, reserved, occupied by
 " homestead settlers, pre-empted, or other-
 " wise disposed of, other lands, designated as
 " aforesaid, shall be selected by said com-
 " panies in lieu thereof, under the direction
 " of the Secretary of the Interior, in alter-
 " nate sections designated by odd numbers as
 " aforesaid, nearest to and not more than ten
 " miles beyond the limits of said first-named
 " alternate sections; and as soon as the said
 " companies, or either of them, shall file in the
 " office of the Secretary of the Interior a map
 " of the survey of said railroad, or any por-
 " tion thereof, not less than sixty continuous
 " miles from either terminus, the Secretary
 " of the Interior shall withdraw from sale
 " public lands herein granted on each side of
 " said railroad, so far as located and within
 " the limits before specified."

Section 4 of the act provided that upon the
 completion of each section of twenty or more
 consecutive miles of road the President should
 appoint Commissioners to examine the same, and,
 upon the report of the Commissioners of the com-

pletion and equipment thereof, patents should issue to the Company for the lands therein granted, to the extent of, and coterminous with, the completed section of the road, and so upon the completion of each succeeding section of twenty miles or more.

The lands in suit are opposite to and coterminous with the first two sections or forty miles of road so completed by the Company south from Portland.

THE BILL.

The bill admits (Record, p. 13) that under the legislation of Oregon the Oregon Central Railroad Company was designated as the beneficiary of the grant, and became the corporation entitled to all the benefits and subject to all the obligations of said Act of Congress, and that the Oregon and California Railroad Company became the successor and assign of the said Oregon Central Railroad Company.

It admits (Record, pp. 13, 14) that, on the 29th day of October, 1869, the Oregon Central, having duly filed its acceptance of the grant in all respects in accordance with law, filed with the Secretary of

the Interior its map of definite location opposite the lands in question in this suit; that such map of definite location was accepted by the Secretary of the Interior on January 29, 1870, and that the lands above described were, in February, 1870, withdrawn in pursuance of orders filed by the Secretary of the Interior; that the railroad of the said Company was duly constructed opposite these lands within the time limited by law for the completion of the said portion of said road; that, the first twenty consecutive miles of this railroad next south of Portland having been completed, Commissioners to examine the same were appointed by the President, and, on December 31, 1869, made due report of the completion and equipment of said twenty miles, as required by the act, and on January 29, 1870, the President accepted and approved the same and ordered patents to issue to the Company for the lands in granted limits coterminous with said completed road, and in like manner on September 28, 1870, report was duly made to the President of the due completion and equipment of the second section of twenty miles (next south of the first section above referred to), and such report was duly accepted and approved, and patents

were ordered to issue to the Company for land in granted or place limits coterminous with said second section, and that these forty miles taken together covered the line of said Company's railroad opposite the lands described in the bill and some distance southwardly therefrom.

The bill further admits (Record, p. 14) the issue of patents in the usual form, which included the lands embraced and described in the bill, and that the entire line of railroad of the Oregon and California Company has been fully constructed and been duly accepted by the President, and has been continuously and still is operated by the Company; but the bill claims that the ministerial officers of the United States acted erroneously and contrary to law in issuing the patents for the lands described in the bill, and that they are void and should be so declared.

The bill further shows (Record, p. 15) that the defendant Company on February 7, 1880, sold to the defendant Hurlburt a part of the lands covered by one of the patents, and by warranty deed dated February 26, 1880, conveyed the same to him, and that he thereupon went into possession of the lands so sold and conveyed to him and made valuable and permanent im-

provements thereon, and remained in possession thereof to the time of filing the bill; and that the defendant Thomas L. Evans similarly acquired through sale by the Company and warranty deeds of conveyance another portion of the lands in suit covered by another of said patents. The bill concedes that the lands so conveyed to said Hurlburt and Evans were purchased and granted from the Oregon and California Railroad Company in good faith for value, in reliance upon the apparent title to the lands under the patents from the United States to the Company, and without actual notice of any defect in the title of the Company to the lands, but charges that the purchasers were subject to constructive notice of the Acts of Congress, and that under those Acts no title could pass to them.

The bill plainly concedes that under the land grant of July 25, 1866, above referred to, and the proceedings thereunder, if they stood alone, good title was acquired by the defendant Company, and its grantees, but the bill seeks to invalidate the grant by reason of the grant to the Northern Pacific Railroad Company, which is alleged to have covered the lands described in the bill.

To this end it sets forth the Act of Congress creating the Northern Pacific Railroad Company, and granting lands to it entitled "An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route," approved July 2, 1864, and the subsequent Joint Resolution of Congress entitled "A Resolution authorizing the Northern Pacific Railroad Company to issue its Bonds for the Construction of its Road and to secure the same by Mortgage, and for other Purposes," approved May 31, 1870, which have already so frequently been under consideration by this Court.

For greater perspicuity the material portions of the Northern Pacific Act, and of the Joint Resolution affecting the same, are here set forth.

THE NORTHERN PACIFIC ACT OF 1864 AND JOINT RESOLUTION OF 1870.

Section 1 of the Act of 1864 creates the corporation and authorizes it to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances—namely:

"Beginning at a point on Lake Superior,

" in the State of Minnesota or Wisconsin;
 " thence westerly by the most eligible rail-
 " road route, as shall be determined by said
 " company, within the territory of the United
 " States, on a line north of the forty-fifth de-
 " gree of latitude to some point on Puget's
 " Sound, *with a branch, via the valley of the*
 " *Columbia River, to a point at or near*
 " *Portland, in the State of Oregon, leaving*
 " *the main trunk line at the most suitable*
 " *place, not more than three hundred miles*
 " *from its western terminus.*"

Section 3 of the act provided :

" That there be, and hereby is, granted
 " * * * every alternate section of public
 " land, not mineral, designated by odd num-
 " bers, to the amount of twenty alternate
 " sections per mile, on each side of said rail-
 " road line, as said company may adopt,
 " through the territories of the United States,
 " and ten alternate sections of land per mile
 " on each side of said railroad whenever it
 " passes through any state, and whenever on
 " the line thereof, the United States have
 " full title, not reserved, sold, granted, or
 " otherwise appropriated, and free from pre-
 " emption, or other claims or rights, *at the*
 " *time the line of said road is definitely fixed,*
 " *and a plat thereof filed in the office of the*
 " *commissioner of the general land office ;*
 " and whenever, prior to said time, any of
 " said sections or parts of sections shall have

“ been granted, sold, reserved, occupied by
“ homestead settlers, or preëmpted, or other-
“ wise disposed of, other lands shall be
“ selected by said company in lieu thereof,
“ under the direction of the Secretary of the
“ Interior, in alternate sections, and desig-
“ nated by odd numbers, not more than ten
“ miles beyond the limits of said alternate
“ sections.”

Section 6 of the act provided :

“ That the President of the United States
“ shall cause the lands to be surveyed for
“ forty miles in width on both sides of the
“ entire line of said road, after the general
“ route shall be fixed, and as fast as may be
“ required by the construction of said rail-
“ road ; and the odd sections of land hereby
“ granted shall not be liable to sale, or entry,
“ or preëmption before or after they are sur-
“ veyed, except by said company, as provided
“ in this act.”

By Section 8 of the Act the grant was conditioned upon the Company's commencing and completing the whole road within the time prescribed by the act.

On April 10, 1869, Congress passed a Joint Resolution (16 Statutes, page 57) authorizing the Northern Pacific Company to extend its branch line from a point at or near Portland, Oregon, to

some suitable point on Puget Sound, to be determined by the Company, and also to connect the same with its main line west of the Cascade Mountains in the Territory of Washington, but without any additional land grant. But this concession seems to have never been accepted by the Company, and at any rate is immaterial to the present controversy.

The Northern Pacific Railroad Company did not in fact begin the construction of its road until after the passage by Congress on the 31st of May, 1870, of the following Joint Resolution (16 Statutes, page 378) :

*“ Resolved by the Senate and House of
“ Representatives of the United States of
“ America in Congress assembled, That the
“ Northern Pacific Railroad Company be, and
“ hereby is, authorized to issue its bonds
“ to aid in the construction and equipment
“ of its road, and to secure the same by
“ mortgage on its property and rights of
“ property of all kinds and descriptions,
“ real, personal, and mixed, including its
“ franchise as a corporation; and, as proof
“ and notice of its legal execution and
“ effectual delivery, said mortgage shall
“ be filed and recorded in the office
“ of the Secretary of the Interior; and also
“ to locate and construct, under the provi-*

" sions and with the privileges, grants, and
 " duties provided for in its act of incorpora-
 " tion, *its main road to some point on Puget*
 " *Sound, via the valley of the Columbia*
 " *river, with the right to locate and construct*
 " *its branch from some convenient point on*
 " *its main trunk line across the Cascade*
 " *Mountains to Puget Sound ; and in the*
 " event of there not being *in any State or*
 " *Territory in which said main line or branch*
 " *may be located*, at the time of the final
 " location thereof, the amount of lands per
 " mile granted by Congress to said company,
 " within the limits prescribed by its charter,
 " then said company shall be entitled, under
 " the directions of the Secretary of the
 " Interior, to receive so many sections of land
 " belonging to the United States, and desig-
 " nated by odd numbers, *in such State or*
 " *Territory*, within ten miles on each side of
 " said road, beyond the limits prescribed in
 " said charter, as will make up such deficiency,
 " on said main line or branch, except mineral
 " and other lands as excepted in the charter
 " of said company of eighteen hundred and
 " sixty-four, *to the amount of the lands that*
 " *have been granted, sold, reserved, occupied*
 " *by homestead settlers, pre-empted, or other-*
 " *wise disposed of subsequent to the passage*
 " *of the act of July two, eighteen hundred*
 " *and sixty-four. And that twenty-five miles*
 " of said main line between its western ter-
 " minus and the City of Portland, in the

“ State of Oregon, shall be completed by the
 “ first day of January, anno Domini eighteen
 “ hundred and seventy-two, and forty miles
 “ of the remaining portion thereof each
 “ year thereafter, until the whole shall be
 “ completed between said points: *Provided*,
 “ that all lands hereby granted to said com-
 “ pany which shall not be sold or disposed of
 “ or remain subject to the mortgage by this
 “ act authorized, at the expiration of five
 “ years after the completion of the entire road,
 “ shall be subject to settlement and pre-
 “ emptory like other lands, at a price to be
 “ paid to said company not exceeding two
 “ dollars and fifty cents per acre; and if the
 “ mortgage hereby authorized shall at any
 “ time be enforced by foreclosure or other
 “ legal proceeding, or the mortgaged lands
 “ hereby granted, or any of them, be sold by
 “ the trustees to whom such mortgage may
 “ be executed, either at its maturity or for any
 “ failure or default of said company under
 “ the terms thereof, such lands shall be sold
 “ at public sale, at places within the States
 “ and Territories in which they shall be sit-
 “ uate, after not less than sixty days’ previ-
 “ ous notice, in single sections or subdivisions
 “ thereof, to the highest and best bidder:
 “ *Provided further*, That in the construction
 “ of the said railroad, American iron or steel
 “ only shall be used, the same to be manu-
 “ factured from American ores exclusively.

“ SEC. 2. *And be it further resolved*, That

“ Congress may at any time alter or amend
 “ this joint resolution, having due regard to
 “ the rights of said company, and any other
 “ parties.”

The Bill sets forth (pp. 2-3) the proceedings of the Northern Pacific Railroad Company under the Act of 1864, and the Joint Resolution of 1870, so far as deemed material to this controversy as follows:

THE PERHAM MAP.

This map is reproduced in the record and marked 336.

[It will be remembered that, at the time when this map was presented to the Secretary, the Act of 1864, which authorized the construction of the main line “to some point on Puget’s Sound, *with a branch via the valley of the Columbia River to a point at or near Portland,*” was the only act in force in favor of the Northern Pacific Railroad Company].

The map was transmitted by Josiah Perham, then President of the Company, to the then Secretary of the Interior, March 6, 1865, with a letter of that date, a copy of which is as follows (Record, p. 81):

“ WASHINGTON, D. C., 6 March, 1865.

“ HON. J. P. USHER, Secretary of the Interior :

“ SIR—Under authority from the board of
 “ directors of the Northern Pacific Railroad
 “ Company, I have designated on the accompanying map in red ink the general line of
 “ their railroad from a point on Lake Superior,
 “ in the State of Wisconsin, to a point on
 “ Puget Sound, in Washington Territory, via
 “ the Columbia River, adopted by said company as the line of said railroad, subject only
 “ to such variations as may be found necessary
 “ after more specific surveys, and I respectfully
 “ ask that the same may be filed in the office
 “ of the Commissioner of the General Land
 “ Office, together with a copy of the charter
 “ and organization of said company, and that
 “ under your directions the lands granted to
 “ said company may be marked and withdrawn
 “ from sale in conformity to law.

“ I am, respectfully, your ob't serv't,

“ JOSIAH PERHAM,

“ Pres't N. P. R. R. Company.”

On March 9, 1865, the then Secretary of the Interior transmitted this map to the then Commissioner of the General Land Office (Exhibit D, Record, p. 82) :

On June 22, 1865, the then Commissioner of the General Land Office declined to order a with-

drawal upon the Perham Map and returned it to the Secretary of the Interior (Exhibit E, Record, pp. 83-4):

[This letter was endorsed in pencil as follows: "Sec'y sustains Commr.'s refusal." See Record, p. 84, at foot.]

THE ATTITUDE OF THE NORTHERN PACIFIC COMPANY BETWEEN THE REJECTION OF THE PERHAM MAP AND THE PASSAGE OF THE JOINT RESOLUTION OF 1870.

The bill further alleges that on April 27, 1867, E. F. Johnson, chief engineer of the Northern Pacific Railroad Company, addressed to the Commissioner of the Land Office a letter, stating that he was directed by the company, as their engineer, to commence at the earliest practicable moment the survey and location of the line of their road in Wisconsin and Minnesota. After referring to the terms of the charter of the company requiring the eastern terminus of the road to be at a point on Lake Superior within the limits either of Wisconsin or Minnesota, the letter proceeded (Record, p. 165):

"Already, as I am informed, two railroad companies, having land grants from the

" Government, have located their lines con-
 " necting with Lake Superior near its west-
 " ern extremity. In order that the line of
 " the Northern Pacific Railroad Company
 " may be so located as to interfere as little as
 " possible with other lines, and secure to the
 " company its quota of land under the grant
 " made to it, it is desirable to know what
 " lands within the limits prescribed in its
 " charter have been disposed of either to rail-
 " way companies or otherwise, including
 " such as have been withdrawn or reserved
 " to the Indians.

" It is not probable that the terminus of
 " the Northern Pacific Railroad, if placed on
 " the northern side of the lake, will be es-
 " tablished further east than Buchanan, and
 " if upon the south side, farther east than
 " the head of Chequamigon Bay. Should
 " this latter point be selected, the line, on
 " leaving the lake, will probably incline
 " somewhat to the south, not, however, more
 " than about ten miles, and thence it will run
 " by a nearly direct course to near Crow
 " Wing or Fort Ripley, on the Mississippi,
 " and thence to near Breckenridge on the
 " Red River.

" Wherever the terminus may be upon
 " the lake, whether at either of the points
 " named or between them, the line will not,
 " I think, cross the Independent meridian
 " which forms in part the boundary between
 " Wisconsin and Minnesota farther north

“ than twenty miles north of the fifth correction line in Minnesota, or further south
“ than twenty miles south of the same line.”

Mr. Johnson encloses a map on which he asks the Commissioner to indicate the limits of the land granted, which would inure to the company in the State of Minnesota by either proposed route from the lake, with which request the Commissioner complies by letter dated May 8, 1867 (see pp. 165-66 of Record and Map Numbered 342).

The bill further refers to a letter of J. Gregory Smith, President of the Company, to Jay Cooke, dated February 17, 1870 (transmitted on the following day by Mr. H. D. Cooke on behalf of the Company to the Secretary of the Interior), and the Secretary's reply thereto dated February 21, 1870, which letters appear on pages 85 and 86 of the record.

The letter of President Smith requests Cooke to impress upon the Secretary the great importance of protecting the Northern Pacific in the matter of their lands while the surveys are being made; states that organized bands of speculators are working in advance of their surveying parties, entering and taking up the most valuable of their lands and thus depriving them of the only means left for building their road; asking

for the withdrawal from public entry, except in cases of actual settlers under the homestead laws, of all the lands in Minnesota north of the parallel, say of St. Cloud, about 47 or $46\frac{1}{2}$, say for a period of ninety days, which would enable the company to complete its surveys and file its map in the department. He adds (Record, p. 85):

“ Whether any precedent exists for the
 “ method we propose, I do not know; but the
 “ manifest equity of our request I am sure
 “ none can deny. Nor can any injury result
 “ to any legitimate interest. As to an honest
 “ and actual settler under the homestead we
 “ do not seek to interpose any obstacle,
 “ but we do think we have a right to ask pro-
 “ tection as against parties whose only object
 “ is to plunder us.”

The Secretary's letter in reply (Record, p. 86) says:

“ In reply I have to state that upon a map
 “ being filed showing the designated route of
 “ the Northern Pacific Railroad from the point
 “ on Lake Superior, fixed upon as the ‘begin-
 “ ning of the road,’ to the western boundary
 “ of Minnesota, an order will be issued to
 “ the Commissioner of the General Land
 “ Office to withdraw temporarily the odd
 “ sections not sold, reserved, &c., for twenty
 “ miles on each side thereof.”

“ The company’s surveys must have progressed so far that a route can be designated which will vary but little from what it will be when definitely located. Such a withdrawal will prevent the granted sections being entered and will accomplish the object Mr. Smith has in view. This is all the Department can do under the circumstances.”

No other proceedings were taken by the Northern Pacific Railroad Company prior to the passage of the Joint Resolution of May 31, 1870, which authorized the Company “ to locate and construct
 “ * * * *its main road to some point on Puget Sound via the valley of the Columbia River,*
 “ with the right to locate and construct its branch
 “ from some convenient point on its main trunk
 “ line across the Cascade Mountains to Puget
 “ Sound.”

THE PROCEEDINGS OF THE NORTHERN PACIFIC
 COMPANY AFTER THE PASSAGE OF THE JOINT
 RESOLUTION OF 1870.

The Bill further alleges that on August 4, 1870, two maps of general route were presented to the then Secretary of the Interior by Johnson, chief engineer of the Northern Pacific, copies of which maps appear in the record, being numbered 333

and 334. Copies of the affidavit and certificate accompanying these maps are attached to the Bill and printed (Record, pp. 87 to 90).

The map numbered 333 is on its face entitled "Map showing the location of the Northern Pacific Railroad from its initial point on Puget Sound via the valley of the Columbia River to the mouth of the Walla Walla river." The affidavit accompanying the map refers to the surveys and explorations made, and the information obtained as "sufficient to enable the said Company to determine *approximately* and by reference to appropriate landmarks the proper position for the line of their said road on those portions, *with a view to the withdrawal from market or from settlement* of the lands granted to the said Company on either side of their said road" (Record, p. 87), and refers to the line from Puget Sound to a point opposite the mouth of the Walla Walla River as one of the portions of the railroad, "the proper location of which has *thus* been ascertained."

The certificate of the President of the Railroad Company certifies that "certain portions of the line or route for said road were so far definitely fixed by resolution of the Board of Directors of said Company on the eighth day of July, A. D.

" 1870, as to make it the duty of the President
 ' of the said Company to request the Honorable
 " the Secretary of the Interior to withdraw or
 " withhold from sale and settlement the public
 " lands to which said company are entitled on
 " either side of the lands [line] of their road so
 " described as aforesaid in the certificate of their
 " engineer in chief," and adds: "They, therefore,
 " respectfully ask that their interests may be pro-
 " tected so far as they can be by a withdrawal of
 " lands, as above set forth.

" Such protection, it is believed, is in strict
 " accordance with the intention of Congress in
 " granting lands to the Company for the con-
 " struction of their road, and will save the Com-
 " pany from a serious loss or diminution in
 " the value of the grant consequent upon the
 " delay necessary in making the surveys *for filing*
 " *a location in the usual form.*"

[The resolution adopted July 8, 1870, referred
 to in the foregoing certificate, is set forth at page
 130 of the record, and is as follows :

" Resolved, That the President cause a *prelim-*
 " *inary location* with a map of the main road
 " of the Northern Pacific Railroad Company, com-
 " mencing at Whatcom on Puget Sound, thence

“ running southerly on the easterly side of the
 “ said sound to Portland, in Oregon, and from the
 “ point where the said road crosses the Columbia
 “ River, and on the north side thereof, and by the
 “ valley of the said river to the mouth of the Snake
 “ River, to be filed in the office of the Secretary of
 “ the Department of the Interior, at Washington,
 “ at as early a day as practicable. Also to cause a
 “ like preliminary location, with a map of the
 “ main line, from the point on the Red River
 “ where the said road may cross the said river;
 “ running thence to the Missouri River at the
 “ point of intersection of the Yellowstone with
 “ the Missouri, and thence up the valley of the
 “ Yellowstone to a point in the Rocky Moun-
 “ tains, which shall be common to a line to be
 “ run either down the valley of the Salmon River
 “ or the Clearwater River, and to file said map
 “ with the Secretary of the Interior at Wash-
 “ ington.”]

The map numbered 333 showed a line ex-
 tending from near the International Boundary
 line southerly along the easterly side of Puget
 Sound or of the chain of inland tide waters con-
 nected with the Straits of Juan de Fuca to their
 southern extremity; thence southerly to the Colum-

bia River and along the easterly and northerly or right bank of that river to a point opposite to the mouth of the Walla Walla River in said Territory. The other map (No. 334), filed on the same date, indicated the general route of the Northern Pacific from Lake Superior to the same, or substantially the same, point on the Columbia River, near the mouth of the Walla Walla River. These maps show at a glance that they are merely maps of preliminary route, and make no pretense of being maps of definite location.

On August 13, 1870, the Secretary acknowledges to the President of the Company the receipt from the Chief Engineer of the "two
" maps showing the general route of the Northern
" Pacific Railroad, commencing at the mouth of
" the Montreal River in Wisconsin and termi-
" nating at the international boundary line on
" Simiahmoo Bay in Washington Territory." He denies the right of the Company to cover and control all the waters connected with Puget Sound, and states that he has directed the Commissioner to withdraw the odd-numbered sections within twenty miles on each side of the route in Wisconsin and Minnesota and in Washington Territory only to withdraw such sections south of the Town of Steilacoom (Record, pp. 90-91).

The direction to the Commissioner bearing the same date, August 13, 1870, is printed at page 79, and instructs him to "direct the proper local " land officers in the States of Wisconsin and " Minnesota to withhold from sale, pre-emption, " homestead and other disposal the odd-numbered " sections not sold, reserved, and to which prior " rights have not attached, within twenty miles on " each side of the route, and in like manner " direct those officers *in Washington Territory* " to withhold such odd-numbered sections as " lie south of Town of Steilacoom;" the withdrawal to "take effect from the receipt of " the order at the local office."

The Oregon withdrawal order is printed at page 80 of the Record and was to take effect upon its receipt by the Register and Receiver, which took place October 15, 1870.

The Bill alleges that the lands described therein were odd-numbered sections or parts of odd-numbered sections of public lands not mineral within the place limits of the proposed line of railroad as designated by the map numbered 333, and within the limits of the withdrawal ordered.

[The Northern Pacific never filed any map of

definite location of the route from the mouth of Walla Walla River via the Columbia River to any point at or near Portland, and never built any portion of the road on that route.]

THE NORTHERN PACIFIC FORFEITURE ACT.

The bill further shows—to complete the alleged title of the United States to the lands in question—that by an Act of Congress entitled “An Act to forfeit certain lands heretofore granted for the purpose of aiding the construction of railroads, and for other purposes,” approved September 29, 1890, the United States resumed title to and restored to the public domain all lands theretofore granted to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not then completed and in operation, for the construction or benefit of which such lands were granted; and the bill avers that the Northern Pacific Railroad Company had not, at the date of the passage of said bill, completed, and was not then operating, any portion of its said railroad opposite to or coterminous with any of the lands described in the bill, and said Company, at the time of filing the bill, had not yet built and was not building or

operating any railroad opposite to or coterminous with said lands.

AMENDMENT TO BILL.

By amendment to the bill (Record, p. 20) it further appeared that "no other maps of route or "location of the line of the proposed railroad "of said Northern Pacific Railroad Company "between Wallula and Portland were ever filed, "either with the Secretary of the Interior or the "Commissioner of the General Land Office," and that there were no other withdrawals in Oregon upon the portion of the Northern Pacific Railroad referred to except that based on the letter of the Secretary of August 13, 1870 (Record, p. 79), and that based on the letter of the Secretary of October 27, 1870 (Record, p. 80), which ordered the withdrawal increased to forty miles on each side of the route and that no withdrawal of indemnity lands was ever ordered or made on account of said line of road between the points named. Appended to this amendment to the bill (Record, p. 78) was the certificate of the Commissioner of the General Land Office to the effect that no map of the definite location of the Northern Pacific Railroad between Wallula, State of

Washington, and Portland, State of Oregon, was ever filed in his office, nor was any withdrawal of indemnity lands ever made on account of said railroad between said points.

PROCEEDINGS UPON DEMURRER TO THE BILL.

The defendants demurred to the bill as amended, and, after argument, the Circuit Judge, GILBERT, J., overruled the demurrer, upon the mistaken assumption that the map of August, 1870 (No. 333), was a map of definite location; that thereby the grant made by the Northern Pacific Act attached to the lands in question, and so attached as of the date of the original Act of 1864, so that when the subsequent Act in favor of the defendants was passed in 1866 these lands were already granted to the Northern Pacific, and the grant to the defendants did not include or cover them.

The gist of the opinion of the Circuit Judge appears on pages 28 and 29 of the Record, as follows:

“ On the 13th day of August, 1870, the
“ company filed a second map, designating
“ the main line by way of the north bank of
“ the Columbia River, as in the Perham

“map. It was a map of definite location,
 “and thereupon the Secretary of the In-
 “terior formally withdrew the lands and
 “issued his notice. Whatever objection
 “may be urged to the Perham map, it
 “must be conceded that the map of
 “August 13, 1870, in all respects com-
 “plied with the act, and that then, if not
 “before, the line of the Northern Pacific
 “road became definite and fixed.

“In the view I take of the law it would
 “make no difference with the rights of the
 “parties to this suit if the Perham map had
 “not been filed. The grant to the Northern
 “Pacific being prior in date to the grant to
 “the Oregon and California, and the reser-
 “vation of granted lands from the first grant
 “being held not to refer to lands subse-
 “quently granted in aid of another road, the
 “first grant remained prior and superior to
 “the second, and there could be no reversal
 “of the order of their priority, resulting
 “either from the fact that the grantee, un-
 “der the junior grant, filed its map of
 “definite location and constructed a portion
 “of its road before any map was filed of the
 “line of road under the older grant, or from
 “the further fact that in the final construc-
 “tion of the Northern Pacific road no por-
 “tion thereof was established upon the line
 “either of the Perham map or the map of
 “1870. Congress did not offer these lands
 “to the competition of the two companies,

“ and it was not the intention that the more
 “ diligent of the two corporations should
 “ secure them.

“ I hold that the failure of the Northern
 “ Pacific to construct its road by way of the
 “ Columbia River valley, the forfeiture of
 “ its grant therefor declared by Congress in
 “ 1890, and the construction by the Oregon
 “ and California Company of its road in apt
 “ time under its grant of July, 1866, are all
 “ matters foreign to the question under con-
 “ sideration. The fact remains that the lands
 “ in controversy were granted lands at the
 “ time the grant to the Oregon and California
 “ Company took effect. They were, there-
 “ fore, not the subject of the grant to that
 “ company. When that grant was made
 “ the beneficiary thereof had full notice of
 “ the prior grant, and had reason to under-
 “ stand that the lands so devoted to aid the
 “ construction of the other road were not
 “ within the purview of its own grant, and
 “ were not promised it by the United States.”

The only comment which we care to make upon this opinion is that it wholly ignores the true character of the map of August, 1870, as explicitly shown by this Bill, the amendment to the Bill, and all the exhibits thereto, which clearly show that the map was and purported to be only a map of general route.

THE ANSWER TO THE BILL.

Time having been allowed the defendants to answer the bill, they duly filed their answer (p. 33 of the Record), June 25, 1894.

They answer that the Perham map was never accepted by the Secretary or the Commissioner, but, on the contrary, for good and sufficient cause was disapproved and rejected by them both. That it was wholly ineffective as a map of general route or definite location, or for any purpose whatsoever, and that, after its rejection, it was not regarded or treated by the Company or by the Secretary or Commissioner as a valid map for any purpose, and that no subsequent action was ever had or taken as to said map either by the Company or the public authorities.

They further answer that the two maps of general route of August 4, 1870, never became or were maps of definite location or anything more than maps of general route, and they deny that any map of definite location of the Northern Pacific Railroad between Wallula and Portland or its vicinity, or opposite the lands in controversy in this suit, or any of them, was ever presented to or filed with the Secretary of the Interior or the Commissioner of the General Land Office,

and they deny that any withdrawal of indemnity lands was ever made on account of said railroad or railroad line opposite the lands in question.

They further deny that all the lands in controversy in this suit were within the place limits of the proposed line of the Northern Pacific as designated by the maps of August 4, 1870, or that all of such lands were within the limits of any withdrawal duly or properly ordered in respect thereof, claiming that the Northern Pacific never became entitled to any withdrawal of any lands within the State of Oregon opposite the line shown on the maps of August 4, 1870, which were distant more than twenty miles from the proposed line of railroad as indicated upon said map, and therefore deny that any lands in controversy in this suit which were distant more than twenty miles from the said proposed lines of railroad could be within any place limits of said railroad, or could be lawfully withdrawn in respect thereof, and they further aver that the patents to the Oregon and California Railroad Company under its claim thereto, under the Act of 1866, included about fifty-six thousand acres of land distant more than twenty miles from said line of general route of the Northern Pacific.

They insist upon the validity of their patents and of the title of Hurlburt and Evans under the Oregon and California Company's deeds, by virtue of which they hold.

They further allege that, besides the land sold to Hurlburt and Evans, the Company had from time to time before complainant's demand for reconveyance of any of the lands involved in the suit sold to divers other persons and parties, as stated in the Schedule annexed to the answer and printed at pages 36 to 49 of the record, portions of the lands in controversy in the suit, and that these had been purchased in good faith for full and valuable consideration, without notice or knowledge of any alleged defect in the Company's title to the lands or of any claim of the United States in respect thereto, and that such purchasers or their transferees or a large portion thereof had entered into actual possession of the lands, and remained in possession thereof at the date of answer and had made valuable and permanent improvements thereon, and aver that all such sales had been made prior to the time of the assertion of complainant's claim that the lands had not passed to the Company under its grant.

The Schedule shows that 61,336.23 acres of

the land involved in the suit had been so sold by the Company.

THE EVIDENCE.

Evidence was taken to show that although the best line for a railroad from a point three hundred miles east of Puget Sound to a terminus at or near Portland would be on the banks of the Columbia as nearly as practicable, yet that there were other lines than the one down the immediate bank of the Columbia from such point three hundred miles east of Puget Sound to Portland, which would be *within the valley of the Columbia*, and that while a direct road down the gorge in which the Columbia River largely runs from Wallula to the neighborhood of Portland would be liable to damage and destruction by frequent overflows, these other lines would not (Record, pp. 122-128).

It further appears in evidence (Record, p. 129) that simultaneously with the filing of the maps of general route on August 4, 1870, the engineer-in-chief of the Northern Pacific expressly notified the Secretary of the Interior that it was probable the Northern Pacific might wish to vary the location of a portion of their line situated between the mouth of Boulder Creek on Jefferson

River, in Montana, and the Columbia River, and that material changes might have to be made because of the impracticability of the route indicated.

The resolutions of the Board of Directors of the Northern Pacific Railroad Company were put in evidence, in respect to the maps of general route of August 4, 1870, whereby it appeared that the President was directed to cause a *preliminary location* with a map of the main road of the Northern Pacific from Puget Sound via the Columbia River to the mouth of Snake River, to be filed in the office of the Secretary at as early a date as practicable; also to cause a like preliminary location with the map of the main line in other parts of the route to be filed (Record, p. 130); *vide supra*, p. 23-24.

It further appears by the proceedings of the Northern Pacific Board of Directors of October 26, 1870 (Record, pp. 130-131), that the location of the line from Lake Superior to the point in Washington Territory opposite the mouth of the Walla Walla River was laid down on the map as an approximate line only with the approbation of the Secretary of the Interior, and with the understanding that, as the located line was

made from actual surveys, the Company might have the privilege of changing the line so as to conform to the actual location, and hold the lands granted according to such final survey, and that with this understanding the map with the line traced upon it was filed and the request made that the lands should be withdrawn by the Interior Department; that subsequent to the filing of the map, and before any action was taken by the Department, the engineer-in-chief having received intelligence that the route proved impracticable in the valley of the Salmon River, notified the Secretary that so much of said line in Montana and Idaho as pertained to the Salmon River route was withdrawn, and requested no action by the department thereon, and that afterwards notice was received by the President of the Company from the Secretary that the Company's map was received and filed and that the lands to the extent of twenty sections per mile in Minnesota, Oregon and Washington Territory were withdrawn up to Seattle.

It further appeared by letters of the Secretary put in evidence that on October 12, 1870, the Northern Pacific had altered its road from the map of August, 1870, in the State of Minnesota (Record, pp. 133 to 136).

An affidavit of the President of the Company was further introduced (Record, pp. 132-133) giving the history of the map of August, 1870 ; that the map was filed with the express understanding between the Secretary of the Interior and the Company that the line designated upon the map was an approximate line only of the map of general route, and that the same might be changed, and that it was changed accordingly, and portions of it were withdrawn and a new map of general route substituted February 21, 1872.

The papers relating to the substitution of February 21, 1872, appear at pages 137-140 of the record.

It was shown that the Interior Department had always disregarded the Perham Map from the time of its rejection in 1865, and had never treated the Northern Pacific Maps of 1870 as anything more than maps of general route.

A report of the Commissioner of the General Land Office to Secretary Schurz, which was transmitted by the latter to the United States Senate in 1880 in reply to an inquiry in respect to proceedings under the Northern Pacific grant, was put in evidence (Record, pp. 156 to 163). From this it appears (p. 160) that the first map of gen-

eral route for this portion of the road was the map accepted August 13, 1870, and upon which withdrawal was ordered September 20, 1870; and numerous subsequent changes in general route are referred to and described. Among the maps attached to this report are the map numbered 329, which shows the proposed line of 1870, the amendment of February, 1872, the constructed line from Kalama to Tacoma of 1874, and the general route map for the branch line of August, 1873, with the amendments thereto of 1876 and 1879.

There was also put in evidence the material portion of the official Interior Department statement concerning land grants prepared in 1888 by direction of the Secretary of the Interior, showing the general route maps of the portion of the Northern Pacific Railroad between the Eastern boundary of Washington Territory via the valley of the Columbia River and the international boundary to have been filed August 13, 1870, and withdrawal to have been ordered September 20, 1870, November 21, 1870, and at various dates in 1872; also showing that there was never any definite location of this portion of the line; and in the column of remarks referring to the "Road" still uncompleted between Wallula Junction,

" Wash., and Portland, Oregon. Company uses
" road of Oregon Rwy and Navigation Co. be-
" tween said points " (Record, folder 347).

It may perhaps be suggested that the proofs as to the character of the maps of August, 1870, is unnecessarily extended, but this no doubt resulted from the fact that in passing upon the demurrer the Circuit Judge had, notwithstanding the allegations of the bill upon the subject, chosen to assume that these maps were maps of definite location and had based his decision upon that assumption.

THE MATERIAL DATES.

The dates material to the controversy, stated in their chronological order, would seem to be as follows:

July 2, 1864. Original Northern Pacific Act passed, authorizing main line to Puget's Sound and branch line to Portland.

March 6, 1865. Perham Map transmitted to Secretary of Interior. (This map was never accepted, but was rejected by the Commissioner of the General Land Office June 22, 1865, in which rejection thereof the Secretary of the Interior concurred.)

July 25, 1866. Oregon Company's Granting Act passed.

October 29, 1869. Oregon Company's map of definite location filed opposite all lands involved in suit.

December 31, 1869. Commissioners appointed to examine Oregon line filed report of construction of first twenty miles.

January 29, 1870. Report of Commissioners accepted by President and patents ordered to issue for lands coterminous with completed road.

January 29, 1870. Oregon Company's map of definite location accepted by Secretary of the Interior.

January 31, 1870. Withdrawal ordered by Commissioner of General Land Office on Oregon Company's map of definite location.

February 16, 1870. Lands withdrawn by local officers for Oregon Company in accordance with its map of definite location.

May 31, 1870. Northern Pacific Joint Resolution passed, authorizing construction of main line to Puget Sound via valley of Columbia River and branch line from its main line across Cascade Mountains to Puget Sound.

August 4, 1870. Northern Pacific Map of General Route filed.

August 13, 1870. Foregoing map accepted by Secretary of the Interior.

September 20, 1870. Orders issued for withdrawal within twenty miles limits from Northern Pacific general route upon date of receipt by Register and Receiver of orders of withdrawal.

September 28, 1870. Oregon Company's second twenty miles section accepted by President and patents ordered to issue therefor.

October 15, 1870. Northern Pacific withdrawal order of September 20, 1870, received at Oregon Land Office.

October 27, 1870. Order of Secretary of the Interior increasing withdrawal ordered to forty miles on each side of route.

September 29, 1890. The Northern Pacific Forfeiture Act.

[There was never any definite location or construction of the portion of the Northern Pacific Railroad opposite the lands in suit.]

SUMMARY.

In summarizing the results which would seem to follow from this state of facts, it may be said :

FIRST. The Northern Pacific Grant, whether

under Act of 1864 or Joint Resolution of 1870, never attached to any of the lands in suit.

SECOND. The Oregon Grant attached to the lands granted to it upon the filing of the Oregon Company's map of definite location, October 29, 1869, or, certainly, upon the acceptance of that map, January 29, 1870.

THIRD. Unless the Perham Map, notwithstanding its rejection by the Interior Department, effected on the 6th of March, 1865, *ex proprio vigore*, an absolute statutory withdrawal, as of that date, along the whole Northern Pacific line, from Lake Superior to Puget Sound (a wholly preposterous claim), there was never any withdrawal, statutory or otherwise, affecting the lands in suit until upon or after the filing of the Map of August, 1870, except the withdrawal of February, 1870, in favor of the Oregon Company.

FOURTH. If the rights accruing upon the filing of the Map of August, 1870, so far as the line west of the mouth of the Walla Walla River was concerned, depended upon the Joint Resolution of 1870 which authorized the construction of the main line via the Columbia River to Puget Sound, then in respect to that line the Oregon Grant was the prior grant, and the case is pre-

cisely within the case of the Northern Pacific Railroad Company vs. The Musser-Sauntry Company (168 U. S., 604); that is to say, the lands were distinctly *excepted* from the operation of the grant to the Northern Pacific.

IN SHORT, the Northern Pacific Grant never attached to these lands for want of a map of definite location or construction of the line, and before they were withdrawn for any purpose the granted lands vested in the Oregon Company upon the filing of its map of definite location October 29, 1869, or certainly upon its acceptance January 29, 1870, and all the lands were withdrawn for the benefit of the Oregon Company by the withdrawal of February, 1870.

It would seem that no claim of interference with the Oregon grant by or through the Northern Pacific grant could be asserted except upon the following grounds:

FIRST. That the passage of the Act of July 2, 1864, operated *eo instanti* to withdraw from the operation of all subsequent grants all lands between the international boundary on the north and a line forty miles as to Territories, and twenty miles as to States, south of the 45th parallel.

SECOND. That the Perham Map, notwithstanding its rejection, effected *ex proprio vigore* an immediate withdrawal, as of March 6, 1865, of all lands within the forty and twenty mile limits from the lines shown thereon, from Lake Superior to Puget Sound.

THIRD. That notwithstanding the attaching of the Oregon grant and the vesting of title in the Oregon Company on the filing of the map of definite location October 29, 1869, and certainly on its acceptance January 29, 1870, the filing of the general route map of August, 1870, either alone or taken in connection with the withdrawal orders subsequently issued thereon, divested the Oregon Company's title to these lands.

We submit that none of these propositions can be seriously considered in the present state of adjudications in respect to the effect and operation of land-grant acts.

Of course, if such rights as may have accrued to the Northern Pacific Company upon filing the general route map of 1870, or the issue of withdrawal orders thereon, were dependent, so far as concerned the line on opposite the mouth of

Walla Walla River via the Columbia River to Puget Sound, upon the Joint Resolution of 1870, which authorized the construction of the main line of the Northern Pacific by that route, then in respect of that portion of the line the Oregon grant was the prior grant, which would of itself defeat every claim of interference asserted by the United States in this case.

THE DECISION ON FINAL HEARING IN THE CIRCUIT COURT.

The cause having been submitted on the pleadings and proofs, the Circuit Court, GILBERT, J., entered a decree in favor of the complainant for the lands described in the bill, but the learned Judge now distinctly changes his ground. He holds that upon the proofs the map filed by the Northern Pacific Company on the 13th of August, 1870, and which, upon the decision of the demurrer, had been assumed to be a map of definite location, was not such, but was a map of general route. He says this fact is established by the proof and not disputed by the complainant.

He concedes that "there never was a definite location of the branch line of the Northern Pacific Railroad," and that "the description of

“ the branch line as contained in the act does
 “ not, it is true, fix its point of beginning or
 “ ending, nor definitely determine the location of
 “ any portion thereof,” and then proceeds as
 follows (Record, p. 65):

“ It is not necessary that the title should
 “ have passed to the Northern Pacific Railroad
 “ Company in order that the lands should be
 “ placed in such attitude to the public domain
 “ as to be excluded from a subsequent grant
 “ in aid of another railroad. It is enough if
 “ they were in any way segregated from the
 “ public lands so that at the date of the junior
 “ grant it will be presumed to have been the
 “ intention of Congress to exclude them from
 “ its operation.

“ *I hold that it was such segregation to*
 “ *set apart a larger area within which the*
 “ *lands granted to the Northern Pacific*
 “ *Company were to be selected by it. It*
 “ *was sufficient if the lands in controversy*
 “ *in this suit were subject to the contingency*
 “ *of being within the place limits of the*
 “ *branch line whenever that line should re-*
 “ *ceive its definite location.*”

The Court's view of this matter seems to have
 been that all the lands within the vast area,
 within which, upon any possible location of its
 line, the Northern Pacific granted lands might

have been found, ceased to be public lands *eo instanti* upon the passage of the Act of 1864, so that they were from that time forth absolutely and finally excepted out of the operation of any subsequent grant by the United States. [The effect of this doctrine in respect of a railroad line extending from Lake Superior to Puget Sound, with no limitations except that the line should be "within the territory of the United States on a line north of the forty-fifth degree of latitude," is at least startling.]

The Court then refers to the filing of the Perham Map, March 6, 1865, and the application for a withdrawal of lands within the prescribed area upon both sides of the line shown thereon, and, after overruling certain objections made thereto by the Commissioner of the General Land Office, says (Record, p. 68):

"If a withdrawal of the granted lands
"within the place limits upon both sides of
"the general route so selected *had been*
"ordered by the Commissioner of the Gen-
"eral Land Office, there can be no doubt
"that the effect of such action would have
"been to segregate the withdrawn lands
"from the public lands subject to disposal
"by subsequent grant, and would have oper-
"ated to reserve them therefrom."

And in respect to the Perham Map the Court concludes that

“ This map * * * *furnishes evidence*
 “ of the location of the general route of the
 “ line of the Northern Pacific branch line
 “ and of the consequent segregation of those
 “ lands from the public lands by operation of
 “ law ” (Record, p. 68).

Turning then to the General Route Map of August, 1870, the Court says in respect to that map (Record, p. 69) :

“ But, it is conceded that the map of
 “ 1865 was ineffective to accomplish the
 “ withdrawal of lands, and that its rejection
 “ by the Commissioner of the Land Office
 “ is a conclusive adjudication of its in-
 “ sufficiency; the map of 1870 was open to
 “ no such objection. Upon its receipt in the
 “ Land Office the withdrawal of lands was
 “ made upon the records.

“ No reason is seen why the map of general
 “ route which is required by the act, even if
 “ filed after the date of the junior grant, does
 “ not, so far as the junior grant is concerned,
 “ serve to sufficiently identify the lands cov-
 “ ered by the prior grant. It is true that
 “ after filing the map of general route of 1870
 “ the Northern Pacific Company still pos-
 “ sessed the right to change the line whenso-
 “ ever it should make its definite location
 “ thereof, and that it was required by the

“ act to file such map of definite location for
 “ the purpose of finally indicating the lands
 “ that were to be patented to it. But until
 “ such final map was filed, the map of general
 “ route, whereby the withdrawal was in fact
 “ accomplished, served to sufficiently identify
 “ the granted lands, notwithstanding the re-
 “ served right to alter its location. In the ab-
 “ sence of such map of final location, and un-
 “ til the same is filed, it is a reasonable pre-
 “ sumption that the granted lands are those
 “ which have been withdrawn in pursuance
 “ of the filings of the map of general route, as
 “ required under the terms of the grant.”

The learned Judge cites no authority for this novel and startling theory, nor does he advert to the fact that before this map of 1870 had been filed the Oregon Grant had taken effect by definite location and construction, and the Oregon withdrawal of February, 1870, had been made.

THE DECISION IN THE CIRCUIT COURT OF APPEALS.

Upon appeal to the Circuit Court of Appeals the judgment in favor of the Government was reversed and a decree entered remanding the cause, with directions to dismiss the Bill. The cause was heard in the Circuit Court of Appeals before Judges McKENNA and ROSS, Circuit Judges; and

HAWLEY, District Judge. The opinion of the Court was delivered by Ross, Circuit Judge, and HAWLEY, District Judge, concurred therein. McKENNA, Circuit Judge, dissented.

The majority of the Court referring to the filing by the Oregon Company in October, 1869, of its map of definite location, at which time its grant attached by reason thereof, holds that the Joint Resolution of 1870, as held by this Court in the case of *United States v. The Northern Pacific Railroad Co.*, 152 U.S., contained a new grant to the Northern Pacific Railroad Company, but did not embrace any public land disposed of after the passage of the Act of July 2, 1864; and that the Joint Resolution of May 31, 1870, and the proceedings taken thereunder by the Northern Pacific Railroad Company have, therefore, no bearing whatever on the question in this case, and that the effect given by the Court below to the maps filed by the Northern Pacific Railroad Company given under and pursuant to the provisions of the Joint Resolution constitutes one of the errors into which the Court below fell in its decision of the case. The Court then holds that the Perham Map filed in 1865 indicated a route not authorized by the Act of 1864; that it was utterly indefinite and was properly rejected; and

could not effect a statutory withdrawal of the lands in question for the benefit of the Northern Pacific Company; that the act itself did not operate, with or without the Perham map, to withdraw or segregate the lands in controversy from the public domain; that it was not enough that the Northern Pacific might, if it chose to do so at some time or other, select a line opposite to them or within twenty or forty miles of them for its railroad; that, until some designation of route, no specific lands were withdrawn by force of the Act of 1864 from the public domain.

The Court says (Record, p. 174):

“ It is said that the grant contained in the
 “ act in and of itself was ‘an appropriation
 “ ‘of the public lands.’ Of what public
 “ lands? Of all the public lands situated
 “ within that immense belt, through and
 “ along which the Northern Pacific Railroad
 “ Company was authorized to locate and
 “ build its road? Manifestly, if, prior to
 “ any designation by the grantee company
 “ of the line of road it was authorized to
 “ locate and build, the act making the grant
 “ in and of itself operated as an appropria-
 “ tion of any particular land, it operated as
 “ an appropriation of all public lands within
 “ the United States situated north of
 “ the forty-fifth degree of latitude and be-

"tween the termini named in the act; for,
 "prior to some designation of the route, it
 "could not be known where the grantee
 "company would find the most eligible rail-
 "road route, along which route it was author-
 "ized to build. We repeat, therefore, that
 "prior to the designation of some route no
 "distinction can be made between any of the
 "public lands not mineral situated in the
 "belt through and along which the North-
 "ern Pacific Railroad Company might have
 "located and constructed its road. Is it
 "possible that all of that immense body of
 "public land was by the Act of July 2, 1864,
 "in and of itself, without any designation by
 "the grantee company of the line of its road,
 "withdrawn from subsequent grants? Un-
 "doubtedly not."

And again (Record, p. 175):

"Until there is some designation of route
 "by the grantee there is nothing to segre-
 "gate any particular land from the mass of
 "public lands, and manifestly, if such segre-
 "gation never occurs, those that otherwise
 "might be covered by the grant remain
 "public lands and subject to any other valid
 "grant that Congress may have made em-
 "bracing them. The grant of July 2, 1864,
 "to the Northern Pacific Railroad Company,
 "never having taken effect so far as con-
 "cerns the lands in controversy in this suit,
 "they were public lands at the time of the

“grant to the Oregon and California Rail-
“road Company, and at the time of the defi-
“nite location by that Company of the road
“it was authorized to build along and oppo-
“site to them.”

McKENNA, Circuit Judge, in his dissenting opinion, after insisting that the grant to the Oregon Company, being subsequent in date, was not within the express exception contained in the grant to the Northern Pacific Company by the Act of 1864, contends that the latter grant amounted by its very terms to such an appropriation of the lands in controversy as to preclude them from the operation of the grant to the Oregon Company by the Act of 1866. He fully agrees with the majority of the Court in throwing out the Perham map and the maps filed under the resolution of 1870 as having no bearing on the question to be determined. He denies that the necessary consequence pointed out by the majority of the Court—that the mere right of selection under the act within the great area from Lake Superior to Puget Sound and from the 45th parallel to the Canadian line—if it operated to withdraw the lands in controversy from the public domain, would necessarily operate to withdraw the entire

lands within the area in the same way, but he says (Record, p. 179):

“ I cannot see (and I say it with deference)
“ that the consequence, though it inevitably
“ follows that if the lands in controversy be
“ deemed appropriated by the Northern Pa-
“ cific Railroad act all lands situated north
“ of the 45th degree of latitude must have
“ been withdrawn, is very embarrassing. To
“ what is it embarrassing? To settlers? To
“ the occupation and development of the
“ country under the land laws? Not at all.
“ This is prevented by the reservations in the
“ grant. To other railroad companies?
“ Grants to these was not a constant but an
“ occasional policy, and dependent so much
“ upon special circumstances as to require
“ (certainly not necessarily to exclude) a
“ right of selection of route in a wide terri-
“ tory. If this was to be primarily guarded
“ against or to be afterwards corrected, the
“ remedy was in Congress, and obvious.”

The learned Judge is not willing to admit that it inevitably follows that all the lands north of the 45th degree of latitude are withdrawn. He thinks that the act limited the area withdrawn to something less than all the land north of the 45th degree of latitude, because, as stated by this Court in *United States vs. Northern Pacific Railroad Co.*, 152 U. S., the authority

given to the Company to adopt the most eligible route did not authorize it, by a map of general route, to cover the unlimited extent of country north of the forty-fifth degree of latitude; on the contrary, when the termini of the railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant. He holds that the power of selection given to the Company by the Act of 1864 of a particular line from a wider extent of territory is a substantial and necessary right which cannot exist in fullness, and with power to exercise it in two railroad companies at the same time. Overlooking the fact that in the case of *United States v. The Southern Pacific Railroad Co.*, 146 U. S., 570, the Atlantic and Pacific Railroad had secured its title to the lands there in controversy by the adoption of a map of definite location, he treats that case as substantially disposing of the one now before the Court, and applies all of its language to the issues here involved.

It is decisive, with the learned dissenting Judge, in favor of the United States, that at the date of the grant to the Oregon Company in 1866 the right of locating its road, so as to take the lands in controversy, existed unimpaired in the Northern Pacific Company under the prior grant of 1864, and continued to exist, and did exist, unimpaired in that Company on January 29, 1870, when the Oregon and California Company filed its map of definite location, and when the company built its road, and the patents sought to be vacated were issued to it, and he concludes that as the right to select the lands in controversy by a definite location of its road, if it had seen fit to make one opposite these lands, still existed by virtue of the Act of 1864, when the defendant's grant was made to it in 1866, the lands in suit were not public lands at that time and were expressly excepted from the terms of the grant to the defendant company.

From the decree of the Circuit Court of Appeals remanding the case with directions to dismiss the bill the United States has appealed to this Court.

FIRST POINT.

The Northern Pacific Railroad Company never acquired any title to or claim or interest in any of the lands in controversy in this suit, or any title to or claim or interest in any specific lands opposite its authorized railroad between the mouth of Walla Walla River and Portland, or a point at or near Portland, because the line of said railroad was never definitely fixed opposite such lands.

The Act of 1864 did not convey to the Northern Pacific Company title to or a claim or interest in all the lands lying between Lake Superior and Puget Sound east and west and a line twenty or forty miles south of the 45th parallel and the Canadian boundary line north and south. What it did convey was the right to construct within that area the road described in that act upon some line to be located by itself in conformity with the provisions of the act, and lands on each side of the road when definitely located, and a title *in præsentia* by relation back from the date of definite location to the date of the grant. To only such lands was any title, right or interest

conveyed. When, by a subsequent grant, made in 1866, the Oregon Company acquired a similar right to build a road and have a like land grant from Portland south to the California line, it took a similar title, claim and interest to lands opposite its road when definitely located, but as of the date of its grant by similar relation. This right, title and interest was, of course, subject to be displaced by the prior grant to the Northern Company so far as the prior grant should, if it ever did, attach to any of the same lands; but it never did, and the title acquired by the Oregon Company is, therefore, absolute and free from any incumbrance growing out of the Northern Pacific grant.

(A) Our position thus stated is inherent in the very nature of land grants as uniformly and consistently expounded by the decisions of this Court from the beginning, without any dissent or qualification. It recognizes and gives full effect to the doctrine of relation, whereby, when the definite location has once been fixed, a present title as of the date of the grant inures to the Railroad Company in the prescribed quantity of lands, measured from the definite location, and it maintains with equal consistency the full and complete title of the

Government to all the lands through which the act permits the road to be located other than those so measured for the prescribed distance from the location as definitely fixed.

Nothing short of an actual, final and definite location, binding upon the Company, not to be departed from except with the consent of Congress, can attach the grant to any specific lands, and then only to the lands measured off from the line as definitely located. Anything short of this clear and methodical precision in the construction of land grants, any departure from this uniform theory established by this Court, would throw the whole system of land grants into inextricable confusion; at any rate, no such departure has ever yet been made or hinted at. From the first utterance of the Attorney-General under the earliest land grant acts to the latest decision of this Court one unerring purpose runs in the exact line of the proposition upon which we stand. No designation of general route or other changeable indication of the line of the road gives any title or interest in any specific lands to the Company to which the option is given to acquire by means of final and definite location a complete title, as of the date of the grant, to lands opposite thereto.

Attorney-General Cushing, in an opinion rendered December 19, 1856, said :

“ In my opinion, therefore, the act, by its
 “ text, makes a conditional grant *in præsent*,
 “ in the nature of a *float*, and which does not
 “ attach to any particular parcel of the pub-
 “ lic lands until the necessary determinative
 “ lines shall have been fixed on the face of
 “ the earth.”

Vol. 8, Opinions Attorney-Generals, 246.

Again, at page 395 of the same volume, the Attorney-General said :

“ For all these reasons, my conclusion is,
 “ that, by surveying and marking the lines
 “ on the ground, those lines are definitely
 “ fixed in so far as regards the present sub-
 “ ject matter, that is, to give to the State an
 “ equitable or inchoate title to the depend-
 “ ent lands, * * * that the State per-
 “ fects its inchoate title by filing the plats
 “ in the land office.”

In the case of *Menotti vs. Dillon*, decided in May 1897 (167 U. S., 703), construing the Central Pacific land grant, which is substantially identical in terms in this respect with the Northern Pacific, Mr. Justice Harlan said, at page 720 :

“ The filing of the map of general route
 “ gave the railroad company no claim to any

“ specific lands within the exterior limits of
 “ such route on either side of the road, the
 “ rule being that a grant of public lands, in
 “ aid of the construction of a railroad, is,
 “ until its route is established, in the nature of
 “ ‘ a float,’ and title does not attach to specific
 “ sections until they are identified by an ac-
 “ cepted map of definite location of the line
 “ of road to be constructed. * * *

“ It is true, as said in many cases, that
 “ the object of an executive order with-
 “ drawing from pre-emption, private entry
 “ and sale, lands within the general route
 “ of a railroad is to preserve the lands,
 “ unencumbered, until the completion and
 “ acceptance of the road. But where the
 “ grant was, as here, of odd-numbered sec-
 “ tions, within certain exterior lines, ‘ not
 “ ‘ sold, reserved or otherwise disposed of by
 “ ‘ the United States, and to which a pre-
 “ ‘ emption or homestead claim may not have
 “ ‘ attached at the time the line of said road is
 “ ‘ definitely fixed,’ the filing of a map of gen-
 “ eral route and the issuing of a withdrawal
 “ order did not prevent the United States, by
 “ legislation, at any time prior to the definite
 “ location of the road, from selling, reserving
 “ or otherwise disposing of any of the lands
 “ which, but for such legislation, would have
 “ become, in virtue of such definite location,
 “ the property of the railroad company.”

And in *Northern Pacific Railroad Co. v. San.*

ders,¹ 66 U. S., 620, decided by the Court in April 1897, the Court said (p. 634):

“ The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted.”

There is obviously the same need of certainty as to the subject of conveyance in a grant by Act of Congress as in a grant by an individual, and this certainty is secured in a land grant by Act of Congress by means of the artificial doctrine of relation from the ascertainment of the subject by definite location back to the date of the grant, and can only be predicated of it in that way. It might be competent for Congress to fix some other method of ascertaining the location, but it never has done so and did not do so in this particular instance. An ascertainment by the means declared by Congress and adjudged by this Court is vital and essential to any title, right or interest in the Company in any specific lands. It is only by definitely fixing the line as the line on which the road is to be built that the necessary criterion is established for determining the granted lands.

Approximate maps, maps of general route, are changeable and ascertain nothing. They do not affect the title in any way; that still remains in the Government. It is never certain that the definite location will correspond with the general route or with the withdrawals under it in whole or in part. It may be so far remote that the widest stretch of the land grant will never touch it or come within the measuring distance of it prescribed by the act. The proposition we are contending for is so important and controlling in the present controversy, and is so firmly imbedded in the decisions of this Court, that we venture, at the risk of wearying its patience, to recall its uniform utterances on the subject:

The opinions of Mr. Cushing were before the Supreme Court in the cases arising upon the Iowa grant, in 9 Wallace, *R. R. Co. v. Fremont County* (p. 89) and *R. R. Co. v. Smith* (p. 95).

In the first case Mr. Justice Nelson said (p. 94):

“ Until the line of the railroad was
“ definitely fixed upon the ground, there
“ could be no certainty as to the particular
“ sections of lands falling within the grant;
“ nor could the title to any particular sec-
“ tion on the line of the road vest in the
“ company. The grant was in the nature

“ of a float until this line was permanently
 “ fixed. Now, the proofs show that the loca-
 “ tion of the road was not made on the
 “ ground and adopted by the company till,”
 &c.

The same grant was involved in *Railroad Land Co. v. Courtright* (21 Wall., 310, 316), and the Court said :

“ When the line of the road was fixed, and
 “ the location of the odd sections thus became
 “ certain, the title of the State acquired pre-
 “ cision, and at once attached to the land.”
Schulenberg v. Harriman, 21 Wall., 44, 60 :

“ The title passed to the sections, to be
 “ afterwards located ; when the route was
 “ fixed their location became certain, and the
 “ title, which was previously imperfect, ac-
 “ quired precision and became attached to the
 “ land.”

Leavenworth, &c., R. R. Co. v. U. S., 92
 U. S., 733, 741 :

“ They vest a present title in the State of
 “ Kansas, though a survey of the lands and a
 “ location of the road are necessary to give
 “ precision to it, and attach it to any partic-
 “ ular tract.”

Mo., &c., Ry. Co. v. Kan. Pac. Ry. Co., 97 U. S., 491.

Grinnell v. Railroad Co., 103 U. S.,
 739, 742.

In the last case above cited Mr. Justice Miller said :

“ The grant under the act of 1856 was, as
 “ has been often said, a grant *in præsenti*,
 “ and though exactly what this means has
 “ been the subject of much controversy, we
 “ think its ascertainment is not difficult.
 “ The only doubtful element of the problem
 “ is the location of the road, which, by the
 “ terms of these grants, is necessary to iden-
 “ tify the sections granted on each side of it.
 “ Whenever that is done so that a surveyor
 “ or the officers of the Land Department can
 “ protract the line of the route on the maps
 “ of the public lands within the limit of the
 “ grants, the identity of the lands granted is
 “ mathematically ascertained, and the title
 “ relates back to the date of the grant. * * *
 “ The means of ascertaining precisely what
 “ lands have passed by the grant is to be
 “ found in the map of the line of the road,
 “ which is filed in the General Land Office
 “ under provisions of the statute.”

Van Wyck v. Knevals, 106 U. S., 360. Mr. Justice Field said (p. 364):

“ The principal question for determination
 “ in this case is, When does the grant made to
 “ Kansas by the act of Congress of July 23,
 “ 1866, * * * take effect so as to cut off
 “ the right of pre-emption from subsequent
 “ settlers on the land? * * * The

“grant is one *in præsenti*, except as its
 “operation is affected by that condition; that
 “is, it imports the transfer, subject to the
 “limitations mentioned, of a present interest
 “in the lands designated. The difficulty
 “in immediately giving full operation to it
 “arises from the fact that the sections desig-
 “nated as granted are incapable of identifi-
 “cation until the route of the road is ‘defin-
 “itely fixed.’ When that route is thus
 “established, the grant takes effect upon the
 “sections by relation as of the date of the
 “Act of Congress. In that sense we say
 “that the grant is one *in præsenti*. It cuts
 “off all claims, other than those mentioned, to
 “any portion of the lands from the date of
 “the act, and passes the title as fully as
 “though the sections had then been capable
 “of identification. * * * When the route
 “of the road is ‘definitely fixed,’ no parties
 “can subsequently acquire a pre-emption
 “right to any portion of the lands covered
 “by the grant. The right of the State and
 “of the company is thenceforth perfect as
 “against subsequent claimants under the
 “United States.

“The inquiry then arises, when is the
 “route of the road to be considered as
 “‘definitely fixed’ so that the grant at-
 “taches to the adjoining sections? The
 “complainant in the Court below, who de-
 “rives his title from the company, contends
 “that the route is definitely fixed, within the

“ meaning of the Act of Congress, when the
 “ company files with the Secretary of the In-
 “ terior a map of its lines, approved by its
 “ directors, designating the route of the pro-
 “ posed road. On the other hand, the de-
 “ fendant—the appellant here—who acquired
 “ his interest by a subsequent entry of the
 “ lands and a patent therefor, contends that
 “ the route cannot be deemed definitely fixed,
 “ so that the grant attaches to any particular
 “ sections and cuts off the right of entry
 “ thereof until the lands are withdrawn from
 “ market by order of the Secretary of the
 “ Interior, and notice of the order of with-
 “ drawal is communicated to the local land
 “ officers in the district in which the lands
 “ are situated.

“ We are of opinion that the position of
 “ the complainant is the correct one. The
 “ route must be considered as ‘definitely
 “ fixed’ when it has ceased to be the subject
 “ of change at the volition of the company.
 “ Until the map is filed with the Secretary of
 “ the Interior, the company is at liberty to
 “ adopt such a route as it may deem best,
 “ after an examination of the ground has
 “ disclosed the feasibility and advantages
 “ of different lines. But when a route is
 “ adopted by the company and a map desig-
 “ nating it is filed with the Secretary of the
 “ Interior and accepted by that officer, the
 “ route is established ; it is, in the language
 “ of the act, ‘definitely fixed,’ and cannot be

“ the subject of future change, so as to affect
 “ the grant, except upon legislative consent.
 “ No further action is required of the com-
 “ pany to establish the route.”

Kansas Pacific Ry. Co. v. Dunmeyer, 113 U. S.,
 629. Mr. Justice MILLER said (p. 634):

“ This entry of Miller’s, therefore, brought
 “ the land within the language of the ex-
 “ ception in the grant as land to which a
 “ homestead claim had attached at the time
 “ the line of said road was definitely fixed.
 “ For we are of opinion, that under this
 “ grant, as under many other grants contain-
 “ ing the same words, or words to the same
 “ purport, the act which fixes the time of
 “ definite location is the act of filing the map
 “ or plat of this line in the office of the Com-
 “ missioner of the General Land Office.

“ The necessity of having certainty in the
 “ act fixing this time is obvious. Up to that
 “ time the right of the company to no
 “ definite section, or part of section, is fixed.
 “ Until then many rights to the land along
 “ which the road finally runs may attach,
 “ which will be paramount to that of the
 “ company building the road. After this no
 “ such rights can attach, because the right of
 “ the company becomes by that act vested.
 “ It is important, therefore, that this act fix-
 “ ing these rights shall be one which is open
 “ to inspection. At the same time it is an
 “ act to be done by the company. The com-

“pany makes its own preliminary and final
 “surveys by its own officers. It selects for
 “itself the precise line on which the road is
 “to be built, and it is by law bound to re-
 “port its action by filing its map with the
 “Commissioner, or rather, in his office. The
 “line is then fixed. The company cannot
 “alter it so as to affect the rights of any other
 “party. Of course, as soon as possible, the
 “Commissioner ought to send copies of this
 “map to the registers and receivers through
 “whose territory the line runs. But he may
 “delay this, or neglect it for a long time,
 “and parties may assert claims to some of
 “these lands, originating after the company
 “has done its duty—all it can do—by
 “placing in an appropriate place, and among
 “the public records, where the statute says
 “it must place it, this map of definite loca-
 “tion, by which the time of the vestiture of
 “their rights is to be determined. We con-
 “cede, then, that the filing of the map in
 “the office of the Commissioner is the act by
 “which ‘the line of the road is definitely
 “fixed’ under the statute (Van Wyck vs.
 “Knevals, 106 U. S., 360). * * *

“When the line was fixed, which we have
 “already said was by the act of filing this
 “map of definite location in the General
 “Land Office, then the criterion was estab-
 “lished by which the lands to which the
 “road had a right were to be determined.
 “Topographically this determined which

“ were the ten odd sections on each side of
 “ that line where the surveys had then been
 “ made. Where they had not been made,
 “ this determination was only postponed un-
 “ til the survey should have been made.
 “ This filing of the map of definite location
 “ furnished also the means of determining
 “ what lands had previously to that moment
 “ been sold, reserved, or otherwise disposed
 “ of by the United States, and to which a
 “ pre-emption or homestead claim had at-
 “ tached ; for, by examining the plats of this
 “ land in the office of the register and re-
 “ ceiver, or in the General Land Office, it could
 “ readily have been seen if any of the odd sec-
 “ tions within ten miles of the line had been
 “ sold, or disposed of, or reserved, or a home-
 “ stead or pre-emption claim had attached to
 “ any of them. In regard to all such sections
 “ they were not granted. The express and
 “ unequivocal language of the statute is that
 “ the odd sections *not* in this condition are
 “ granted (p. 640).”

Buttz v. N. P. R. R. Co., 119 U. S., 55. Mr.
 Justice FIELD said (p. 71) :

“ The act of Congress not only contem-
 “ plates the filing by the company, in the
 “ office of the Commissioner of the General
 “ Land Office, of a map showing the definite
 “ location of the line of its road, and limits
 “ the grant to such alternate odd sections as
 “ have not, at that time, been reserved, sold,

“ granted, or otherwise appropriated, and are
“ free from pre-emption, grant or other
“ claims or rights; but it also contemplates a
“ preliminary designation of the general
“ route of the road, and the exclusion from
“ sale, entry or pre-emption of the adjoining
“ odd sections within forty miles on each
“ side, until the definite location is made.
“ The sixth section declares that after the
“ general route shall be fixed, the President
“ shall cause the lands to be surveyed for
“ forty miles in width on both sides of the
“ entire line as fast as may be required for
“ the construction of the road, and that the
“ odd sections granted shall not be liable to
“ sale, entry or pre-emption before or after
“ they are surveyed, except by the company.
“ The general route may be considered as
“ fixed when its general course and direction
“ are determined after an actual examination
“ of the country or from a knowledge of it,
“ and is designated by a line on a map show-
“ ing the general features of the adjacent
“ country and the places through or by
“ which it will pass. The officers of the
“ Land Department are expected to exercise
“ supervision over the matter so as to require
“ good faith on the part of the company in
“ designating the general route, and not to
“ accept an arbitrary and capricious selec-
“ tion of the line irrespective of the character
“ of the country through which the road is
“ to be constructed. When the general

" route of the road is thus fixed in good
 " faith, and information thereof given to the
 " Land Department by filing the map thereof
 " with the Commissioner of the General
 " Land Office, or the Secretary of the Inter-
 " ior, the law withdraws from sale or pre-
 " emption the odd sections to the extent of
 " forty miles on each side. The object of
 " the law in this particular is plain: it is to
 " preserve the land for the company to which,
 " in aid of the construction of the road, it is
 " granted." * * *

" Nor is there anything inconsistent with
 " this view of the sixth section as to the
 " general route, in the clause in the third
 " section making the grant operative only
 " upon such odd sections as had not
 " been reserved, sold, granted, or otherwise
 " appropriated, and to which pre-emption and
 " other rights and claims have not attached,
 " when a map of the definite location has
 " been filed. The third section does not em-
 " brace sales and pre-emptions in cases where
 " the sixth section declares that the land shall
 " not be subject to sale or pre-emption. The
 " two sections must be so construed as to
 " give effect to both, if that be practicable."

Sioux City Land Co. v. Griffey, 143 U. S., 32, 38:

" The first and principal question is at
 " what time the title of the railroad company
 " attached, whether at the time the map of
 " definite location was filed in the General

“ Land Office at Washington, or when, prior
 “ thereto, its line was surveyed and staked
 “ out on the surface of the ground. While
 “ the question in this precise form has never
 “ been before this Court, yet the question as
 “ to the time at which the title attaches, under
 “ grants similar to this, has been often pre-
 “ sented, and the uniform ruling has been
 “ that it attaches at the time of the filing of
 “ the map of definite location.”

Then, after citations from the decisions in *Van Wyck v. Knevals* and *Pacific Railway Co. v. Dunmeyer*, the Court said (p. 39):

“ The reasoning of these opinions is ap-
 “ plicable here. The fact that the company
 “ has surveyed and staked a line upon the
 “ ground does not conclude it. It may sur-
 “ vey and stake many, and finally determine
 “ the line upon which it will build by a com-
 “ parison of the cost and advantages of each ;
 “ and only when by filing its map it has com-
 “ municated to the Government knowledge
 “ of its selected line, is it concluded by its
 “ action. Then, so far as the purposes of the
 “ land grant are concerned, is its line defi-
 “ nitely fixed ; and it cannot thereafter, with-
 “ out the consent of the Government, change
 “ that line so as to affect titles accruing there-
 “ under.”

The Courts were met in the very early his-

tory of the judicial construction of these grants with the difficulty that under the common law there was a necessity of identification of the thing granted by the conveyance, or it would be void for uncertainty. To avoid this and effectuate (properly) the intent of Congress, following the principle in *Rutherford vs. Green's Heirs* (2 Wheat., 196) and *Fremont vs. United States* (17 How., 676), it was held as a proper construction of an act of this character that it vested a present interest, was a grant *in præsenti*, but uncertain as to location until identified by the act of the Company, viz., by selecting and designating on a map the final location of its line.

It has never been held that the term "grant *in præsenti*" in a railroad land grant meant more than a right to have or take as of the date of the grant the land identified on the filing of a map of definite location. The so-called "present interest" which passed by the grant was this right, and nothing more; and it was given as fully as Congress could give it.

Justice MILLER, in *Grinnell v. C. R. I. & P. R. R. Co.* (103 U. S., p. 739), states the position clearly, at page 744:

"The grant under the Act of 1856 was, as

“ has been often said, a grant *in præsent*,
 “ and though exactly what this means has
 “ been the subject of much controversy, we
 “ think its ascertainment is not difficult.
 “ The only doubtful element of the problem
 “ is the location of the road, which, by the
 “ terms of these grants, is necessary to
 “ identify the sections granted on each side
 “ of it. Whenever that is done, so that a
 “ surveyor or the officers of the Land Depart-
 “ ment can protract the line of the route on
 “ the maps of the public lands within the
 “ limit of the grants, the identity of the
 “ lands granted is mathematically ascertained,
 “ and the title relates back to the date of the
 “ grant.

“ So far as lands are found in place, when
 “ this is done, not coming within the excep-
 “ tions as sold, or held under pre-emption,
 “ the title, or at least the right to this land in
 “ place, is at once vested in the State or in the
 “ company to which the State has granted it,
 “ and the means of ascertaining precisely
 “ what lands have passed by the grant is
 “ to be found in the map of the line of the
 “ road, which is filed in the General Land
 “ Office under provisions of the statute.”

In the long line of railroad land grant cases
 from *R. R. Co. v. Fremont* (9 Wall., 89) to
Curtner v. U. S. (149 U. S., 675), the doctrine
 stated by Mr. Justice MILLER has not only never

been modified or deviated from, but it has never been more plainly and comprehensively put.

No one can misunderstand it nor hesitate as to its proper application when a case is presented.

R. R. Co. v. Fremont Co. (9 Wall., 89).

“ Until the line of the railroad was definitely fixed upon the ground, there could be no certainty as to the particular sections of lands falling within the grant; nor could the title to any particular section on the line of the road vest in the company. The grant was in the nature of a float until this line was permanently fixed.”

R. R. Co. v. Smith (9 Wall., 95, 97).

“ This, of course, left it to be determined by the location of the road what precise lands were granted.”

R. R. Co. v. Courtright (21 Wall., 310, 316).

“ It [the Act of May 15, 1856] passed a title * * * to be afterwards located. When the line of the road was fixed * * * the title of the State acquired precision, and at once attached to the land.”

Schulenburg v. Harriman (21 Wall., 44, 60).

“ The title, which was previously imperfect, acquired precision and became attached to the land.”

L. L. & G. R. R. v. The U. S. (92 U. S., 733).

“ ‘There be and is hereby granted ’ are
 “ words of absolute donation. * * * They
 “ vest a present title in the State of Kansas,
 “ though a survey of the lands and a loca-
 “ tion of the road are necessary to give pre-
 “ cision to it, and attach it to any particular
 “ tract. The grant then becomes certain,
 “ and by relation has the same effect upon
 “ the selected parcels as if it had specifically
 “ described them. In other words, the grant
 “ was a float until the line of the road should
 “ be definitely fixed ” (p. 741).

M., K. & T. Ry. Co. v. K. P. Ry. Co. (97
 U. S., 491).

“ When that [establishment of route] was
 “ settled, the location became certain, and
 “ the title that was previously imperfect
 “ acquired precision and attached to the
 “ lands ” (p. 497).

Ryan v. The R. R. Co. (99 U. S., 382).

“ The grant was *in præsentia*, and acquired
 “ precision upon the definite location of the
 “ road ” (p. 389).

Platt v. U. P. R. R. Co. (99 U. S., 48).

“ By force of the grant, however, and by
 “ the definite fixing of the route of the road,
 “ and the filing of the map thereof * * *

“ together with the completion of the road
 “ * * * the title to that tract had become
 “ vested in the company ” (p. 56).

Ry. Co. v. Alling (99 U. S., 463).

“ When such location and appropriation
 “ were made, the title, which was previously
 “ imperfect, acquired precision, and by rela-
 “ tion took effect as of the date of the grant ”
 (p. 475).

Van Wyck v. Knevals (106 U. S., 360).

“ The grant is one *in præsentī*, * * *
 “ that is, it imports the transfer * * * of
 “ a present interest in the lands designated.
 “ The difficulty in immediately giving full
 “ operation to it arises from the fact that the
 “ sections designated as granted are incapable
 “ of identification until the route of the
 “ road is definitely fixed. When that route
 “ is thus established, the grant takes effect
 “ upon the sections by relation as of the date
 “ of the act of Congress.”

“ In that sense we say that the grant is one
 “ *in præsentī*. It cuts off all claims, other
 “ than those mentioned, to any portion of
 “ the lands from the date of the act, and
 “ passes the title as fully as though the sec-
 “ tions had then been capable of identifica-
 “ tion ” (p. 365).

See also, *St. P. R. R. v. Winona R. R.* (112
 U. S., 720).

On definite location, the title then perfected, related back to the date of the statute. No vested right can attach to lands in place until identified, and this cannot be until map of definite location (*Ibid.*, pp. 731, 732).

Wisconsin R. R. Co. v. Price County (133 U. S., 496).

The title conferred by the act is necessarily an imperfect one, because, until the lands are identified they could not be located; until then, therefore, the grant was a float, but, on definite location, became fixed.

Deseret Salt Co. v. Tarpey (142 U. S., 241), is a strongly-worded case as to present interest passing by the grant, but the opinion says of the lands,

“they could not be located until the line of
“the road was fixed. The grant was, there-
“fore, in the nature of a ‘float’; but, when
“the route of the road was definitely fixed,
“the sections granted became susceptible of
“identification, and the title then attached as
“of the date of the grant,” &c.

So that in every case of railroad land grants, prior to definite location of line and filing of the map thereof with the proper officers of the Interior

Department, the grant *in præsenti* is only a 'floating' right to some land to be ascertained later, if at all,—complete by the act, so far as concession on the part of the Government is concerned, but, practically, the 'grant' as to any particular tracts of land exists in contemplation only until 'definite location.'

Therefore, wherever in this argument these grants are spoken of as being *in præsenti* it is to be understood as used by Mr. Justice FIELD in *Van Wyck v. Knevals*, 106 U. S., 360, 365 :

"When that route is thus established [by 'definite location'], the grant takes effect 'upon the sections by relation as of the date of the Act of Congress. In that sense we say that the grant is one '*in præsenti*.'"

And in view of this unbroken and harmonious series of adjudications upon the subject, the cases of the *United States v. Southern Pacific R. R. Co.*, as reported in 146 U. S. and 168 U. S., afford convincing proof that the theory upon which we stand for our rights in this case is no longer open to doubt or disputation.

In the former case, *U. S. v. Southern Pacific R. R. Co.*, 146 U. S., 570, the relative positions of the two companies to each other and to the Gov-

ernment in respect to the lands in controversy were identical with those of the parties in the present action, with this controlling and there fatal difference, that, whereas in the present case the prior grant to the Northern Pacific Company never took effect as to any particular line by means of a definite location, giving title as of the date of the grant, in that case the Atlantic and Pacific Company, by filing a map of its definite location under its prior grant, acquired title as of the date of the grant to the very lands in controversy; and it was upon this very point that the court held that they were excluded from the effect of the subsequent grant to the Southern Pacific Railroad Company. But no man can read that opinion without reaching the inevitable conclusion that but for the filing of the map of definite location, which gave title to the Atlantic and Pacific to the very lands in controversy as of the date of its prior grant, the title of the Southern Pacific Company would have been recognized as perfect, because without that those lands were not embraced in and would not have passed by the grant to the Atlantic and Pacific. The case is decided on the very ground which we are here now urging, the Court there demonstrating that

the title to the very lands in controversy was by means of the definite location by the Atlantic and Pacific—and by no other means, for no other means was possible—conveyed by the prior grant to the Atlantic and Pacific as of the date of that grant. It says (p. 593):

“ The grants to both the Atlantic and Pacific and the Southern Pacific Companies were grants *in præsentî*. The language is “ ‘ there be, and hereby is, granted.’ The construction and effect of such words of grant have often been considered by this court.”

It cites the then recent case of *St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co.*, 139 U. S., 1, 5, thus :

“ The language of the statute is ‘ that “ ‘ there be, and hereby is, granted’ to the Company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.

“ The route not being at the time determined, the grant was in the nature of a float and the title did not attach to any specific sections until they were capable of identification ; but when once identified the title

“ attached to them as of the date of the grant,
 “ except as to such sections as were specific-
 “ ally reserved. It is in this sense that the
 “ grant is termed one *in præsenti*; that is to
 “ say, it is of that character as to all lands
 “ within the terms of the grant, and not
 “ reserved from it at the time of the definite
 “ location of the route.”

The Court then proceeds (p. 594):

“ In view of this late and clear declara-
 “ tion, it would be a waste of time to attempt
 “ a re-examination of the questions, or a re-
 “ statement of the reasons which have
 “ established these as the settled rules of
 “ law in respect to land grants, and made it
 “ so that the old common law rule as to the
 “ necessity of identification to a conveyance
 “ has not been controlling in determining
 “ the scope and effect of a Congressional
 “ land grant,”

relying again on the Court's statement in
Bardon v. Northern Pacific Railroad, 145 U. S.,
 535.

Again, it says, (p. 594):

“ Applying these well-settled rules to
 “ the cases at bar, there can be little difficulty
 “ in arriving at a conclusion. The grant to
 “ the Atlantic and Pacific was made in 1866;
 “ to the Southern Pacific in 1871. They

"were grants *in præsenti*. When maps of
 "definite location were filed and approved,
 "the grants severally took effect by relation
 "as of the dates of the acts. The map of
 "definite location of the Atlantic and Pa-
 "cific Company's road along the lands in
 "controversy was filed and approved on
 "April 11, 1872. Then the specific tracts
 "were designated, and to them the title of
 "the Atlantic and Pacific attached as of
 "July 27, 1866. If anything in the land
 "laws of the United States can be consid-
 "ered as thoroughly settled by repeated de-
 "cisions, it is this. It matters not when the
 "map of definite location of the Southern
 "Pacific was filed and approved, whether
 "before or after April 11, 1872; for when
 "filed the grant could take effect by relation
 "only as of March 3, 1871, and at that time,
 "and for nearly five years theretofore, the
 "title to these lands had been in the At-
 "lantic and Pacific."

It then proceeds to demonstrate from the evi-
 dence that the map of the Atlantic and Pacific,
 the sufficiency of which as a map of definite loca-
 tion had been disputed by counsel, was in fact
 and in law such a map, and holds that it was
 such.

"So now, whatever may have been the
 "dates of filing by the respective companies,

“ the case stands as though the lands granted
 “ to the Atlantic and Pacific had been iden-
 “ tified in 1866, and title had then passed,
 “ and there never was a title of any kind
 “ vested in the Southern Pacific Company ”
 (p. 598).

The Court then explains with renewed clear-
 ness the distinction between the line of definite
 location and of general route, citing the case of
*Buttz v. The Northern Pacific Railroad Com-
 pany*, 119 U. S., 55, which was a case of this
 very Northern Pacific Company, and, observing
 the substantial identity of the two acts, says, at p.
 600):

“ It must be held that here, as there, Con-
 “ gress provided for two separate matters ;
 “ one the fixing of the general route, and the
 “ other the designation of the line of definite
 “ location ; and an examination of the evidence
 “ shows that the map which was filed on
 “ April 3, 1871, was simply one of general
 “ route, and therefore did not work a desig-
 “ nation of the tracts of land to which the
 “ Southern Pacific's grant attached.”

And it was because the title of the Atlantic
 and Pacific had so attached as of the date of its
 prior grant and by means of the filing of a map
 of definite location that the Court held, and so

only was it able to hold, that the title which had been so acquired to the lands in controversy, being forfeited for breach of the condition subsequent by its failure to build the road within the time prescribed, reverted to the United States for its benefit, and was necessarily not included in the subsequent grant to the Southern Pacific.

And in the case between the same parties (*Southern Pacific Railroad v. The United States*, 168 U. S., page 1) it is obvious that there could have been no possible room for the controversy presented to this Court, or for the serious and elaborate consideration which the Court gave to it, if the definite location of the land, which in that case amounted to 700,000 acres, had not been regarded by the Court under the authorities as absolutely essential to the title of the United States, as resumed by the act of forfeiture from the Atlantic and Pacific Company. It was claimed on the part of the Southern Pacific Company that by the production of new evidence it could show that the map of the Atlantic and Pacific Company, filed in 1872, was not in fact and in law a map of definite location, as it had been assumed and held to be in the prior case, but was only at the best a map of

general route, by means of which no title passed by relation to the Atlantic and Pacific Company. And it was attempted, first, to show that the former adjudication in 146 U. S. was not *res adjudicata*, and secondly, that, going behind the judgment, the evidence disproved the existence and the character of the map as a map of definite location.

The Court held against the Southern Pacific on the former ground, but it is plain that the whole controversy would have been out of place and the contentions of the Company could have been answered in a single sentence, if it had been possible for the Court to say that by the terms of the act, or by a map of general route, or by anything short of a map of definite location, the grant could have attached to the specified lands and title thereby vested in the Atlantic and Pacific as of the date of the grant.

(B) The position for which we here contend is in entire harmony with the doctrine that priority of grant determines the question of ownership, without regard to priority of location, as between parties claiming the same lands under different grants. Nor is it necessary for us to claim any

benefit of the exception or reservation contained in the granting clause of the Act of 1864, donating lands to the Northern Pacific; nor do we in any way come in conflict with the observation of the Court in *M., K. & T. Railway Co. v. The K. P. Railway Co.*, 97 U. S., 491, that it was not within the language or the purpose of the reservation in the granting act "to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads," which doctrine was repeated in the case of *St. Paul and Pacific Railroad v. Northern Pacific Railroad*, 139 U. S., 1, in these words (p. 17):

"But independently of this conclusion, we
 "are of opinion that the exception in the act
 "making the grant to the Northern Pacific
 "Railroad Company was not intended to cover
 "other grants for the construction of roads of
 "a similar character, for this would be to
 "embody a provision which would often be
 "repugnant to and defeat the grant itself."

In other words, we are not called upon to claim that, by virtue of the exception contained in the granting clause of the Northern Pacific Act, the Oregon Company could, by a grant subsequent thereto, but procured prior to the definite location of the Northern Pacific road, acquire title to lands

already first granted to the Northern Pacific. What we do claim exactly is this, as has already been made to appear, that there was no grant to the Northern Pacific by the Act of 1864 of the lands in suit or of any lands opposite its authorized railroad between the mouth of Walla Walla River and Portland; that all that was granted to that company in that behalf was the lands opposite to and within the prescribed distance from the line of railroad, which that company should locate within the bounds of the prescribed area by means of a definite location, if it did in fact make such a location. By such means only it would acquire title from the date of the act; but, no such location having been made opposite the lands in suit while the act remained operative and effectual, they acquired no title to these lands and the grant passed no interest in them to that Company.

The observations cited from the decisions referred to in 97 U. S. and 139 U. S. cannot be removed from their context and from the actual cases in which they were uttered, and distorted and perverted to wholly different uses and applications which could not possibly have been within the consideration of the Court when they were uttered. In both of those cases the

contest was between the titles of two railroad companies, one of which had a prior grant and had definitely located its road over and through the very lands in controversy so as to acquire title as of the date of its grant. The observations referred to have no application, and can have no honest application, to a case where, while the power to make it existed, no definite location was ever made, no title acquired, and none of the lands in controversy ever passed under any prior grant.

(C) Nor does our contention involve us in the position denounced by the Court in the case of the Southern Pacific Railroad Co., in 146 U. S., of a scramble with the Northern Pacific Company for the grasping of title by priority of location, or of seeking to acquire land already once given to a like Company, or of claiming for ourselves the benefit of the forfeiture of title which inured to the benefit of the United States alone, or of seeking to appropriate by means of our grant any tract of land within our specified limits which at any time subsequent to its date might have become public lands. We make no such claims and are under no necessity of making them. All we claim is that by the land grant

law as settled and administered by this Court from the beginning, there was no grant of the lands in controversy to the Northern Pacific Railroad Company by or under the Act of 1864; that it never had title and that the lands continued to be and were public lands, when the right to locate was granted to the Oregon and California Railroad Company. It is true that the Northern Pacific Company, if the act of forfeiture had not been passed by Congress, might yet definitely locate its line within reach of the lands in question and so acquire title to them, and might construct its road as so located; that its title to these lands acquired by definite location might become perfect by construction; and that no power but that of Congress could interfere with this right of the Northern Pacific to definitely locate and construct its road, because no one but the grantor can raise the question of a breach of a condition subsequent.

But the road was not definitely located nor constructed, and Congress did pass the forfeiture act, which terminated the right of the Northern Pacific to acquire title to any lands opposite unconstructed road. That terminated finally its possible right to acquire title to any of these lands.

On the other hand, we took our title by our grant and by our subsequent definite location, and perfected it by the construction of the road within the terms of our act, subject to the possibility of the Northern Pacific definitely locating its road so as to reach the same lands. While it had that power to locate, our subjection to that possibility continued; but when, by the forfeiture act, the right of acquiring any lands opposite unconstructed road was taken away, that subjection ceased; and the lands in question remained indisputably ours.

SECOND POINT.

The passage of the Northern Pacific Act of July 2, 1864, did not operate to withdraw *eo instanti* all the public lands within the vast area from Lake Superior to Puget Sound and from the international boundary to a line forty miles or twenty miles south of the 45th parallel of north latitude.

Nothing in previous adjudications of this Court supports or gives countenance to this proposition apparently relied upon by the counsel for the Government in this case, and which necessarily involves the result that the grant to the Northern Pacific, having given that Company leave to locate its road anywhere within a given area of territory, no subsequent grant, however explicit in terms, could be construed to grant to another Company any lands anywhere within that area, in case the Northern Pacific had never definitely located its line and thus limited itself to specific lands. The Government apparently relies upon this proposition because short of this proposition no ground can be found or stated by which to defeat the claims asserted by the Oregon Company in this action. We can discover no other justification for its reliance upon this theory.

Here was an area embracing many vast States and Territories, extending from Lake Superior to Puget Sound, more than fourteen hundred miles, and from say twenty miles south of the 45th parallel to the Canadian line, about three hundred miles, aggregating more than four hundred thousand square miles. The grant to the Northern Pacific (which has been stated by this Court in previous cases as reaching the almost appalling amount of about eighty thousand square miles) was to be acquired in this multifold greater area by actual definite location, and by no other means. Upon filing a map of general route it was to be entitled to withdrawal within the prescribed limits from that particular route, but withdrawal was limited to the distances measured from that route.

Unless it can be successfully contended that by this grant thus to locate within this vast area the Government had cut off all grants for other internal improvements within that area until the Northern Pacific should see fit to limit itself to specific lands by definite location, the grant to the Oregon Company, which complied with its conditions by a definite location and actual construction according to the terms of the act, gave the Oregon

Company good title, subject only to the condition that, if it should happen that the Northern Pacific definitely located its road so as to reach the same lands, it would acquire title thereto by relation as of the date of its prior grant. The right of the prior grant to take lands within this area was not restricted, but the Government did not disable its subsequent grantees from taking subject to the prior grantees' rights.

The construction of the Act of 1864 contended for by the Government, is, we submit, monstrous and impossible. It imputes to Congress necessarily the purpose of withdrawing from the public domain by the very passage of the act, without anything done by the Railroad Company, all the land within the area through which the right of selection and locating is given, and declaring it to be no longer public land and subject as such to the control and action of Congress, and directing that this vast area shall so remain until the Railroad Company should see fit, if it did, to limit and restrict its grant by definitely locating its line.

Our construction, on the other hand, is reasonable and sensible and in entire harmony with and required by the unbroken series of decisions of this Court set forth under subdivision A of our

First Point. It is that Congress, by the land grant of 1864, while giving to the grantee the choice of ground within the territory prescribed by the act, whereupon to locate its road, said explicitly to the grantee: You may take anywhere you please within this area the odd-numbered sections within twenty (or forty) miles on each side of the road, which you shall definitely locate. We give you no more and no less; all such land shall, upon the definite location of your road, be deemed to have ceased, so far as other grants of this character are concerned, to be public land as of the date of the act, but all the rest of this imperial area shall be and remain public land and subject to the disposal of Congress for any purpose it may see fit. If your location, made according to the terms of the act, shall conflict with any subsequent grant, your grant, being prior in date, will take precedence, but all this vast possible area of grant is not granted to you or withdrawn from the category of public lands of the United States for your benefit.

You may obtain withdrawal by filing a proper map showing specifically a line of general route. You may secure the vesting of title as of

the date of the Granting Act by definitely locating your road; but you cannot keep this whole vast area to yourself or withdrawn for your benefit until you choose to limit and restrict your rights by fixing your line.

There is no authority which we can find for the Government's proposition in this regard. Every adjudicated case upon the subject or approaching the subject seems clearly to prescribe wholly different rules of construction irreconcilable with this proposition of the Government. There is not the slightest reason for claiming that Congress intended by this act to withdraw this whole vast area from availability in securing works of internal improvement. Its whole course of conduct in that regard is inconsistent with any such hypothesis.

The determination of the general route of the road and filing a map thereof in the Department of the Interior has always been treated as a prerequisite to any withdrawal under this Northern Pacific Act and similar acts.

Buttz v. Northern Pacific Railroad,
119 U. S., 55.

Dunmeyer Case, 113 U. S., 636.

*St. Paul and Pacific v. Northern
Pacific*, 139 U. S., 1.

THIRD POINT.

The claim set up in argument in the Circuit Court and to some degree apparently countenanced by Mr. Justice McKenna in his dissenting opinion, that the act itself definitely located the branch line of the Northern Pacific Railroad along the immediate course of the Columbia River from the mouth of Walla Walla River to Portland, seems to us equally destitute of authority or foundation.

Such a theory has never been suggested in any other case to our knowledge, and is inconsistent with the whole theory of the land grant law as administered by this Court and with the provisions of the Northern Pacific act itself. Certainly it did not follow from the enactment of the grant of 1864 that the company would ever adopt or definitely locate or construct its road from the mouth of Walla Walla River along the immediate line of the Columbia River to Portland. It never did definitely locate or construct any road there at all, and it is an entirely new theory that the land grant act imposes title upon a company whether it pleases to take

it or not. On the contrary, the act certainly calls for affirmative action on the part of the company to acquire either reservation or title. By the sixth section it must as to every inch of line designate its general route before it can be entitled to the reservation by withdrawal, and by the third section it must make a definite location as to every inch of line before it can acquire title to lands opposite thereto.

But, again, if the act itself worked a definite location all the way or any part of the way down the Columbia River from the mouth of the Walla Walla River to Portland, then all the consequences which follow definite location must ensue, not only as to other railroad companies, but as to all other parties whatever from the mere passage of the act; and all possible settlement of the country through that three hundred miles of the fertile banks of a great river must be deemed to have been cut off by the naked fact of the passage of the act, for, certainly, that definite location once accomplished by whatever means, there could be no homestead rights, no pre-emption rights, no settlers' rights of any kind secured by citizens—consequences which this Court, in its uniform and careful regard for the

interests and rights of homestead and pre-emption settlers, will not overlook.

Besides, there is no foundation geographically for the novel claim made. There was nothing in the act to prevent the company from entering Portland from any point along the valley of the Columbia River. It was not confined by the gorge in which the waters of the Columbia run for a portion of its course, but anywhere in the great watershed which constitutes the valley of the Columbia they could, by their branch, enter Portland, and the evidence shows clearly that there were several such modes of access.

No doubt the route of the branch line, under the Act of 1864, was to some extent limited and restricted; that is to say, it was to be "*via the Valley of the Columbia River.*" But where in that valley? The dissenting opinion proceeds upon the view that it was a narrow valley. But where in that narrow valley was the road located? Assume (though contrary to the fact) that there was only a comparatively narrow range of choice; but, while that range of choice existed, it must be exercised before the line was definitely located.

Again, on which side of the Columbia River

was the road to be built? Does the act define this? Certainly not. The general route map of 1870, which we shall have occasion to consider hereafter, undertook to locate the line preliminarily on the north or right bank of the river; but it might just as well, perhaps better, have been located on the south or left bank of the river; for it is there that the road which was really built between the Walla Walla River and Portland—the road of the Oregon Railway and Navigation Company—was constructed.

Furthermore, according to the construction which has been heretofore adopted for this Northern Pacific Act, the question whether the road was definitely located on the north or the south bank was a very vital one, for it determined the question whether the road would run through a State or a Territory, which has been treated as furnishing the test whether the primary grant was twenty or forty miles wide.

The road certainly could not be said to be definitely located while it remained uncertain whether it was to be located on the north or south side of the river, especially if upon the determination of this question it depended whether the road was to run through a State or a Territory,

and whether the grant opposite the road was to be twenty or forty miles wide.

But it seems useless to further discuss this proposition that the words "via the Valley of the Columbia River" constituted a definite location of a line. It is true that it limits definite location within a narrower area than the provisions in respect to other portions of the road which might be anywhere, so far as the prescriptions of the act are concerned, between the 45th parallel and the international boundary, but it left a wide area of choice, and that choice had to be exercised before there could be a definite location.

Did the term "via the Valley of the Columbia River" definitely locate a line? Suppose the Northern Pacific had undertaken to exercise its right of definite location by using the same language and saying that it had definitely located its line "via the Valley of the Columbia River," and had filed a map showing a red line spread out over that whole valley, both north and south of the river. Would that have been definite location? Certainly not.

But it is said that the line must be a reasonable and direct one. Very true. That is a restriction and limitation upon definite location, but it

is not definite location. Otherwise, the terms of an act, plus this requirement, would constitute definite location of every railroad by force and operation of the act itself.

FOURTH POINT.

The Perham map of 1865 did not operate to withdraw, reserve or in any manner affect the lands in controversy or any lands opposite any of the routes sketched upon it.

It certainly was not a map of definite location, whereby alone the grant could be attached to any lands, nor was it in any sense a map fixing the general route, as required by Section 6 of the Northern Pacific act, nor was it in any sense a map authorized to be filed under that act, whereby any right of withdrawal of land could be claimed. Any executive withdrawal attempted under it would have been unwarranted and unlawful. It was the only act done by the company under the Act of 1864. It was rejected on presentation. The claim of withdrawal made thereunder was refused, and this action was approved by the department in later cases.

N. P. R. R. v. Miller, 7 L. D., 100.

(A) The Perham map was ineffectual for any purpose whatever. It did not conform to the act and was utterly vague and indefinite. Whereas,

the act, Section 1, authorizes the building of a road "beginning at a point on Lake Superior, in
" the State of Minnesota or Wisconsin, thence
" westerly by the most eligible railroad route as
" shall be determined by said company, within
" the territory of the United States, on a line north
" of the forty-fifth degree of latitude to some point
" on Puget's Sound, with a branch, via the valley
" of the Columbia River to a point at or near Port-
" land, in the State of Oregon, leaving the main
" trunk line at the most suitable place, not more
" than three hundred miles from its western terminus," the Perham map does not designate any one point of beginning on Lake Superior, but two, which for several hundred miles proceeding westward are independent and cross each other. Which of these was the line designated and in respect to which might or could or ought withdrawals to have been made? At the western terminus, instead of a line direct to Puget Sound, it indicates a line down the Columbia River and north to Puget Sound wholly unwarranted by the act. In this respect it was apparently a clumsy attempt to claim that unauthorized route for the company for its main line under the act. And the letter of the president which accom-

panied it, and by which it was labeled and described (Record, p. 81), describes it as designating "in red ink the general line of their railroad *"from a point on Lake Superior in the State of Wisconsin,"* without stating which of the two points, *"to a point on Puget Sound in Washington Territory via the Columbia River,"* and saying nothing about any branch, but claiming and professing to designate the unwarranted and false route to Puget Sound by the way of the Columbia River and north from the vicinity of Portland as the main line of its road.

The first section of the act authorized the company to construct its main road by the most eligible railroad route north of the 45th degree of latitude, as shall be determined by the company, to some point on Puget Sound with a branch via the valley of the Columbia River to a point at or near Portland in the State of Oregon, leaving the main trunk line at the most suitable place not more than 300 miles from its western terminus. It is impossible to tell from this map which, if any, route it would adopt at either terminus. At the eastern extremity not only were there two routes in red starting at different points on Lake Superior brought to-

gether in Montana at the point marked A on the map, but there is a still further route in black from a point near the boundary of Minnesota and Dakota to a point in Montana which is described as "*worth an examination for a railroad route.*" Further, the map declares as to the western terminus that H, K, L, M, A, B, C, D is the "*practicable railroad as surveyed by Governor Stevens.*" But there are two H, K's—one from K in Montana over the Cascade Mountains to H on Puget Sound, and one from K by way of Portland to the same point, the one being northwest from K and the other southwesterly from K along the course of the Columbia River to Vancouver, thence north to the point H. There was no effort to designate a branch line at all. There was an apparent effort to appropriate what did not belong to the company by going round by the way of Portland to Puget Sound. It is probably immaterial what the motive was for designating an alternative line of road as to the western terminus from Wallula to Puget Sound. It is perfectly obvious that under the law it was worthless and inoperative, because not locating the road one way or the other.

This Court, in *United States v. N. P. R. R.*

Co., 152 U. S., 284, having this map before it, appears to have condemned it as a map not authorized by the act. The act necessitated two western termini; the map made but one, and that by a route not permitted.

The Interior Department has always condemned it as worthless and inoperative under the act and as utterly void for indefiniteness.

In the *Miller* case, 7 L. D., 100, 104, Secretary Vilas said:

"The line indicated on it is not marked with
"sufficient definiteness to indicate through
"what townships, even, much less sections,
"the line of the road would pass. There is
"not even sufficient representation of the top-
"ographical features of the country to define
"the location, except on portions of the line."

Even without proof of there being direct eligible routes across the Cascade Mountains, this Court, in 152 U. S., held that under the act the company was bound to locate its main line across the Cascade Mountains to Puget Sound and its branch from a point on such main line not more than 300 miles from its western terminus on the sound, via the valley of the Columbia River, to a point at or near Portland; that is, there must be two termini on the west; one somewhere on the

Sound, the other at or near Portland, and entirely disconnected except by the roundabout way of the junction of the "main" and "branch" line. The present record establishes that there are four direct eligible routes across the Cascade Mountains selected afterwards by the company and approved by the Interior Department as shown by the exhibits.

(Sen. Exec. Doc. No. 120; Record, p. 156 *et seq.*; Map of Washington Territory, Map 329, and the Postal Map 348.)

1st. A branch line of August 20, 1873; 2d. An amended branch line of 1876; 3d. Amended branch line of 1879; 4th. Line of constructed road now operated.

These lines are called branch lines because filed since the Joint Resolution of May 31, 1870, which provided for the first time that the main line should be located down the valley of the Columbia and the branch line across the Cascades.

Again, the Perham map entirely ignores the City of Portland, and its immediate connection with the East for the purposes of commerce and traffic. This Court said (152 U. S., 293):

"It is clear that the purpose of Congress, by the Act of 1864, was not to connect

"Portland with Puget Sound, by a road
 "established upon the most direct or eligible
 "route between those places; but, so far as
 "Portland and its vicinity were concerned,
 "to connect them with the East by a branch
 "road, through the valley of the Columbia
 "River, that would strike the main trunk
 "line connecting Puget Sound and Lake
 "Superior. There was no purpose, *by that*
 "act, to make a grant of lands for a road to
 "be located and constructed from a point 'at
 "'or near Portland' to Puget Sound."

The Perham map by its line down the Columbia
 River and up towards Puget Sound leaves
 Portland eight or ten miles away, and with the
 Columbia River between the line and the city.
 It was neither a determination nor adoption of
 any particular line, but an equivocal and alter-
 native experiment setting forth two lines with a
 manifest purpose of leaving the company free to
 choose afterwards which should be its line. It
 violates the first rules which the Court has
 insisted upon as to clearness of determination of
 route by a map of general route.

In *Buttz v. Northern Pacific R. R.*, 119 U. S.,
 55, at page 72 the Court says:

"The general route may be considered as
 "fixed when its general course and direction

“ are determined after an actual examination
 “ of the country or from a knowledge of it,
 “ and is designated by a line on a map
 “ showing the general features of the adja-
 “ cent country and the places through or by
 “ which it will pass. *The officers of the*
 “ *Land Department are expected to exercise*
 “ *supervision over the matter so as to require*
 “ *good faith on the part of the company in*
 “ *designating the general route, and not to*
 “ *accept an arbitrary and capricious selec-*
 “ *tion of the line irrespective of the character*
 “ *of the country through which the road is to*
 “ *be constructed.*”

Throughout its whole extent, and especially at the two termini, the Perham map is nothing but an arbitrary and capricious, equivocal and alternative, designation, not amounting to a selection of line.

In *Hayes v. Parker*, 2 L.D., 554, page 555, considering the provisions of this section, Secretary Taylor said, in language that this Court will, we think, approve :

“ The act in question provides for but one
 “ line of general route and one of definite
 “ location. It is certainly a very grave
 “ question whether legislative withdrawal
 “ operates under any preliminary map other
 “ than the one which the company finally

“determines shall be the settled and fixed
“general route of the road. If legislative
“withdrawals operate upon preliminary
“lines not finally fixed as lines of genera
“route, then we have in this instance a
“legislative withdrawal of a section of the
“country almost entirely different from that
“which was finally included in the lines of
“the general route.”

(B) But the Perham map was rejected, and rightfully rejected by the department; which refused to make any withdrawal thereunder (and the amendment to the bill (Record, p. 20) expressly alleges that the two withdrawals made after the filing of the maps of August 4, 1870, were the only withdrawals made in Oregon upon the portion of the Northern Pacific between Wallula and Portland).

Nor can it be claimed with any sense or reason that the character of the Perham map was such as to accomplish a withdrawal, in spite of the decision of the executive officers against it. If such a result can ever be accomplished or worked by the filing of a general route map, it must, in definiteness, accuracy, legality and conformity to the grant, not only be far in advance of the Perham map, but in all respects absolutely dif-

ferent from it. The case does not present the question for decision of the effect of a presentation and filing of a proper and lawful map of general route improperly rejected by the department as working a legislative withdrawal of lands, for here not only was it obviously a wrongful and insufficient map rightfully rejected, but the company acquiesced in its rejection, not seeking or attempting to disturb or obtain a review or reconsideration of the decision of the department. It acquiesced in silence for two years, and then, on the 27th of April, 1867, it presented another map, accompanied by a letter, which showed that *the general route had not even then been determined on or adopted by the company*, and utterly ignoring the Perham map which had been filed two years before. This map and letter (Record, p. 165, Map 342) seem to be conclusive as an abandonment of the Perham map, although they related particularly to the eastern portion of the line. The map designated two routes approaching each other not nearer than twenty-five or thirty miles and neither route corresponding with those shown on the Perham map. The letter shows the location to be undetermined and wholly problematical. It says, among other things:

“ In order that the line of the Northern
 “ Pacific Railroad Company may be so lo-
 “ cated as to interfere as little as possible
 “ with other lines, and secure to the com-
 “ pany its quota of land under the grant
 “ made to it, it is desirable to know what
 “ lands within the limits prescribed in its
 “ charter have been disposed of, either
 “ to railway companies or otherwise, includ-
 “ ing such as have been withdrawn or re-
 “ served to the Indians.

“ It is not probable that the terminus of
 “ the Northern Pacific Railroad, if placed on
 “ the northern side of the lake, will be estab-
 “ lished further east than Buchanan, and if
 “ upon the south side, farther east than the
 “ head of Chequamigon bay. Should this
 “ latter point be selected, the line, on leaving
 “ the lake, will probably incline somewhat
 “ to the south—not, however, more than
 “ about ten miles—and thence it will run by
 “ a nearly direct course to near Crow Wing or
 “ Fort Ripley, on the Mississippi, and thence
 “ to near Breckenridge, on the Red River.

“ Wherever the terminus may be upon the
 “ lake, whether at either of the points named
 “ or between them, the line will not, I think,
 “ cross the Independent meridian, which forms
 “ in part the boundary between Wisconsin
 “ and Minnesota, farther north than twenty
 “ miles north of the fifth correction line in
 “ Minnesota, or further south than twenty
 “ miles south of the same line.

“ From this description, and referring to
 “ the company's charter, you will be able, I
 “ trust, to furnish to the railroad company a
 “ sketch of such lands as are available under
 “ their grant.

“ The company, while they desire to make
 “ the most of their land grant, will endeavor
 “ to so locate their road as that its character
 “ for directness between important points
 “ and lowness of gradients shall not be in
 “ any respect impaired.”

Again, the correspondence between the Company and the Department preliminary to the filing of the general route map of August, 1870, *demonstrates that the general route had not even then been fixed, and that there was no thought of adhering to the Perham map* (see Record, p. 82).

Again, the resolution passed by the Northern Pacific board as late as July 8, 1870, only about a month before the filing of the general route map of August, proves the company's acquiescence in the rejection of the Perham map, for it directed the president of the company to cause a *preliminary location with a map of the road from Whatcom to Portland, and by the valley of the Columbia River to the mouth of the Snake River, to be filed in the office of the Secretary of the Interior* (Record, p. 130).

We have, then, this case: The United States Government by its constituted authorities in 1865 rejected the Perham map as wholly insufficient and inoperative and in no manner affecting the lands. In 1893, nearly twenty-eight years afterwards, and more than twenty-four years after the Oregon Company, relying upon its previous action, had entered upon the lands under its grant, definitely located and completely built its road, and been practically in the enjoyment of the premises for a quarter of a century, the United States files its bill to recover the lands upon the plea that its own action in rejecting the Perham map had been illegal and should now be reversed, although it had insisted upon, and the Northern Pacific Company had acquiesced in, its action for all that length of time.

The United States having rejected the Perham map in 1865, thus leaving the lands opposite thereto unwithdrawn and open to any other grantee, made the Oregon grant in 1866, which, while the lands remained in the same condition, unwithdrawn and public lands of the United States (except so far as the withdrawal of February, 1870, in favor of the O. & C. is concerned), constructed the forty miles of its road south from Portland and opposite the lands in question.

The first twenty miles was built prior to December 31, 1869, and accepted by the Commissioners on that date. On January 29, 1870, the Commissioners' report was approved by the President, and patents ordered to issue for the lands opposite thereto (all of which were still open public lands unaffected by any withdrawal). In continuation of this work and relying upon the situation as it then existed the Company went on with its construction, and prior to August 13, 1870, and before the situation was in anywise changed, except by the withdrawal of February, 1870, for its own benefit, constructed the next twenty miles of its road, thus completing the whole forty miles of railroad opposite which the lands in controversy lie. During all this time the lands opposite this forty miles remained open public lands unaffected by any withdrawal in favor of any other party, but, after February, 1870, withdrawn for the benefit of this very Company.

Can the United States, after having rejected the Perham map, refused withdrawal thereunder, and left the lands wholly open to other grantees, except so far as the withdrawal in favor of this very Oregon grant was concerned, afterwards be

heard to say that it should have accepted the Perham map; that it should have made a withdrawal for the Northern Pacific thereunder and that it will therefore take to itself the lands which it had formerly left open to the Oregon Company and refused to withdraw as against the Perham map? Can it thus reverse the whole situation which it had established and maintained prior to and during the construction of these forty miles of road?

Between private parties it would be impossible for a more immoral and unconscionable claim to be made, and if the Northern Pacific Railroad Company were now endeavoring to recover the lands from the defendants by virtue of the Perham map and the claim of its validity, and on no other ground, surely the claim would be scouted by any Court. The Northern Pacific Company might have appealed from the decision of the Commissioner rejecting the map, but it never thought of doing so. If there was any wrong done in such rejection, it was by the United States against the Company, and yet now it seeks to avail itself of its own alleged wrong.

In the case of the *United States v. Marshall Mining Company*, 129 U. S., 579, at page 587, the

Court, by Mr. Justice MILLER, said, alluding to a similar predicament of parties :

“ They acquiesced in the proceedings, and
“ made no effort to set aside the patent, or
“ to correct any injustice which had been
“ done them in the proceedings upon which
“ the patent had been issued, while the other
“ parties had full and undisputed possession
“ of the land.

“ It may be said that they could not help
“ themselves, and that this silence and inaction on their part did not imply acquiescence. But they had the right to appeal to the Commissioner of the General Land Office from the order of the Register and Receiver dismissing their application. This was not done, and it never has been done. * * *

“ All the errors and irregularities which
“ occur in the process of entering and procuring title to the public lands of the United States ought to be corrected within the Land Department, which includes the authority vested in the Secretary of the Interior, so long as there are means of revising the proceedings and correcting these errors. A party cannot be permitted to remain silent for more than eight years after he has abandoned a contest, submitted to the decision of the matter at issue, although it may have been erroneous, and then come forward in a court of

“ equity, after the title has passed from the
“ United States, and seek to correct the
“ errors which may have occurred during the
“ progress of the proceedings in the Land
“ Office.”

See, also, the decision of the Court in the opinion of Mr. Justice BREWER, *United States v. Missouri, Kansas and Texas Ry. Co.*, 37 Fed. Rep., 68, 70, where the Circuit Court refused to cancel patents at the suit of the United States after an acquiescence of fourteen years. But this suit was brought twenty-eight years after the Commissioner rejected the Perham map, twenty-two years after the issue of the first, and sixteen years after the issue of the last, patent now sought to be canceled.

Is it now to be said that the whole Northern Pacific grant is to be readjusted from Lake Superior to Puget Sound upon the theory that a legislative withdrawal took effect opposite the lines shown on the Perham map, notwithstanding the Interior Department's utter rejection of that map or any claim thereunder?

FIFTH POINT.

The maps filed by the Northern Pacific Railroad Company in August, 1870, were maps of general route only, and the filing thereof and the withdrawals thereunder did not and could not affect the title to any lands.

The doctrine of relation has never been applied to maps of general route, nor has any hint ever been given in any decision of this Court or of the Land Office that it could be so applied. The filing of Map 333 did not attach the Northern Pacific grant to the lands in controversy, or to any specific lands, and its only legal effect was to cause the withdrawal from sale of lands opposite the route shown on the map, so as to prevent *subsequent* dispositions of them which would except them from the Northern grant in the event of the adoption by the Northern Company as its line of definite location of a line opposite the withdrawn lands and within the prescribed distance therefrom. No such definite location was ever made, and no title passed to the Northern Company whatever to any lands between Wallula

and Portland, and the grant to the Oregon Company made on the 25th of July, 1866, took effect by relation as of that date when that Company filed its map of definite location, October 29, 1869, nine months prior to the filing of these maps of general route by the Northern Pacific, and six months prior to the passage of the Joint Resolution of May 31, 1870, under and by authority of which these maps of general route were filed.

(A) As to the fact of these Northern Pacific maps of August, 1870, being maps of general route as distinguished from maps of definite location, there can be no possible room for doubt upon the record now, although, upon the hearing of the demurrer the learned Judge seems to have mistaken them for maps of definite location.

Not only do they appear upon inspection to be maps of general route, but they were never intended to be anything else. They were received and accepted by the Interior Department only as maps of general route. In very many cases in which they have come before the courts, they have been held to be such. The Land Office has always so considered them, and there was never a holding to the contrary except by Circuit Judge SAWYER in the case of *United States v.*

Northern Pacific Railroad, reported in 41 Federal Rep., 845, which was expressly reversed by this Court in 152 U. S., page 284, this Court expressly declaring, page 290, that they were maps showing the *general route* of the main line from Puget Sound.

The bill avers that these maps were maps of general route only; the answer emphasizes that averment; the proofs taken December, 1894, demonstrate that this was their character.

While the Court below found on the hearing that these maps were only of general route, yet counsel for appellee there insisted they were of definite location, and may so insist here; the question being therefore still open on this appeal, we cite the proofs.

Let us examine them.

The following references are to exhibits in the proofs taken December 13, 1894 (Record, p. 143 *et seq.*):

Meeting of Exec. Com. of Directors N. P. Co., July 8, 1870:

“Resolved, that the President cause a *preliminary location* with a map of the main road of the Northern Pacific Railroad Company, commencing at Whatcom, on “Puget Sound;” thence running southerly

on the easterly side of the said sound to Portland, in Oregon, * * * to the mouth of the Snake River, &c.

This is the action of directors which resulted in the map of August 13, 1870 (Record, p. 144).

Meeting of Directors N. P. Co., October 26, 1870:

Report of the President as to map.

"The line was thus laid down on the map as an *approximate line only*, and with the approbation of the Secretary of the Interior, and with the understanding that * * * *the Company might have the privilege of changing*," &c. (Record, pp. 130-131).

Letter of Chief Engineer Johnson to Secretary Cox, August 4, 1870, advising that

"it is probable the Northern Pacific Railroad Company may wish to vary the location of that portion of their line," &c., and requesting suspension of action thereon (Record, p. 129).

Letter of Secretary Cox to Chief Engineer Johnson, August 5, 1870, complying with above request to suspend action (Record, p. 131).

Affidavit of President of N. P. Co., dated May 20, 1890, giving details as to map of August 13, 1870:

*“ an approximate line only of the map of the
 “ general route ; * * * might be changed,”*
 &c.; this affidavit also includes copy of his
 report of October 26, 1870 (Record, p. 146).

Letter Secretary Cox to Commissioner General
 Land Office, October 12, 1870, transmitting affi-
 davit of officers of N. P. Co. and map, changing
 the line in Minnesota shown on map of August
 13, 1870. Affidavit dated New York, October 1,
 1870 (Record, p. 134):

*“ that during the period above mentioned
 “ surveys and explorations have been made
 “ * * * for determining its proper loca-
 “ tion, and that on the thirtieth day of July
 “ last * * * a written description of an
 “ approximate location with a map or maps
 “ duly certified was filed with the Secretary,”*
 &c. For reasons stated, they “ desire to
 “ amend their said approximate location by
 “ substituting therefor a line or lines,” &c.
 These changes were ratified by the Board
 September 29, 1870 (Record, p. 135).

Letter October 7, 1870 (Record, p. 136), Chief
 Engineer Johnson to Secretary Cox, inclosing
 map, &c., sent to Commissioner by Ex. F.

Letter Secretary Cox to Chief Engineer John-
 son, October 12, 1870, acknowledging receipt of

Ex. G and inclosures, approving the change of route, &c., but hoping

“ the Company will be able to avoid the
“ necessity of any further changes, *except*
“ *upon the final definite location of the*
“ *route* ” (Record, p. 136).

Letter President Smith to Secretary Delano,
February 16, 1872, sending

“ map of the *preliminary line* of road of
“ this Company from the Red River of the
“ North ” (eastern boundary of Dakota) “ to
“ the Columbia, at the mouth of the Walla
“ Walla River ” (Record, p. 137).

Letter from Secretary Delano to Commissioner
Drummond, February 21, 1872, transmitting

“ map of the *preliminary route* of the North-
“ ern Pacific Railroad,” in Ex. I. (Record,
p. 137).

This is the map in the *Buttz* case (119 U. S.,
p. 55).

Certificate to map, that it

“ shows the *general route* of the ‘ Northern
“ ‘ Pacific Railroad,’ from * * * the cross-
“ ing of the ‘ Red River of the North ’ * * *
“ to the Walla Walla River, about fourteen
“ hundred and forty-eight miles; * * *
“ the route that we anticipate will be finally
“ accepted for that portion of the main line,”
etc. (Record, p. 138).

Orders of withdrawal for that map and line (Record, pp. 138-9).

Letter of Secretary Delano to President Smith, February 21, 1872, acknowledging receipt of his letter of 16th, and "accompanying map of the preliminary route," &c. (Record, pp. 139-140).

Senate Ex Doc. 120, 2d Sess., 46th Cong. (Record, p. 156 *et seq*), shows every map of the Northern Pacific Railroad accepted by the department, and specially that the map of August 13, 1870, was of general route only; the Perham map was not included, because it was rejected and was never regarded as a proper map of line of road.

Interior Department Land Grant Statement (Record, folder 347); an official statement showing the maps of the Northern Pacific Railroad and their character; this shows the different maps of definite location for the entire road as constructed, and that there is nothing as to the line between Wallula and Portland except the map of general route of August 13, 1870.

Postal map of Washington (Record, map 348) to show constructed road of Northern Pacific Railroad, and showing a fourth "eligible route" across the Cascades; three are shown by Ex. M. (Record, map 329).

A few references to decided cases are presented on this point :

N. P. R. R. Co. v. St. Paul & P. R. R. Co.
(26 Fed. Rep., pp. 551, 560):

“ On August 13, 1870, a map of general
“ route, * * * was filed. Subsequently,
“ and on October 12, 1870, an amended map
“ of general route was filed.”

In same case on appeal (139 U. S., p. 1):

“ The general location of the route of the
“ Northern Pacific Railroad was designated
“ in 1869, and a map of it, approved by
“ the Secretary of the Interior, was filed in
“ the office of the commissioner of the gen-
“ eral land office in August, 1870. * * *
“ Subsequently this general route in Minne-
“ sota was changed, and a map corrected in
“ accordance with the change approved by
“ the Secretary of the Interior and filed on
“ the 8th of October, 1870; and on the 12th of
“ that month the Secretary ordered the with-
“ drawal of the lands.”

Railroad v. Herring (110 U. S., 27):

“ On August 13, 1870, a map of the gen-
“ eral route of the road to * * * was filed.”

Same finding as to map of October 8th,
1870, and withdrawal as in 139 U. S., page 1.

Hayes v. Parker (2 L. D., 554) holds that the
line of 1870, east of the Columbia, was not even
a general route, but only a trial line; and that the

general route as to that part of the country was the map of February 21, 1872.

Trepp v. N. P. R. R. Co. (1 L. D., 396) holds the same.

N. P. R. R. Co. (5 L. D., 193) holds that the map of August 13, 1870, was a map of general route; and that an amended map of general route was accepted February 21, 1872.

Miller v. N. P. R. R. Co. (7 L. D., 100) embraces a history of all the maps of the Northern Pacific Railroad and (citing *Buttz v. N. P. R. R. Co.*) holds that a map of general route must be approved.

N. P. R. R. Co. v. Flaherty (8 L. D., 542) holds that the general route of the Northern Pacific in Montana was shown on map of February 21, 1872.

To same effect are:

Catlin v. N. P. R. R. Co., 9 L. D., 423.

Randolph v. N. P. R. R. Co., 9 L. D., 416.

N. P. R. R. Co. v. Dunham, 11 L. D., 471.

Tetreault v. N. P. R. R. Co., 15 L. D., 552.

Dellone v. N. P. R. R. Co., 16 L. D., 229.

N. P. R. R. Co. v. Patterson, 16 L. D., 343.

Cole v. N. P. R. R. Co., (17 L. D., 8, p. 16):
“That map (map of August 13, 1870), must be
“considered * * * as a map filed to cover
“the general route intended to be used by the
“railroad company in Eastern Washington.”

In seven opinions of Attorneys-General of the United States the same finding has been made. In a word, in all the very numerous cases in the Departments of the Interior and Justice arising out of this grant, and involving the character of these maps, not one has been acted on with any assumption other than that the maps of August 13, 1870, were of “general route.”

(B) The substance of the matter already presented under our First Point renders it almost a work of supererogation to repeat the reasons and authorities for the proposition that these maps of general route, even if they could be deemed to have been filed under and by authority of the Act of 1864, which preceded the grant to the Oregon Company, are wholly ineffectual under the facts proved in this case to disturb the title of the Oregon Company or to affect in any manner its title to the land as between the United States, as grantor, and the Oregon Company, as grantee.

The act provided for a designation of general route as authority for withdrawal, and for the definite location as the means of vesting title by relation as of the date of the act.

The filing of the map of general route and the withdrawal thereunder give no title to the Company; do not attach the grant to any specific lands; do not cause the grant to embrace the lands as if inserted by description in it. Every such map, every such designation of general route, is tentative only, changeable at the will of the company before final and definite location, and may never be followed by any definite location whatever, as was the fact in the present case so far as relates to the line from Wallula down the Columbia River to Portland, or its vicinity. Being thus changeable, the Company not being held to it or bound by it, the Government, the grantor, is no more held to it or bound by it. It does not effectuate a designation of the lands to be inserted in the conveyance, which still remains, as it were, a conveyance in blank until the definite location enables the law to write the description into the deed, as this Court has over and over again said.

It has already been repeatedly held by this Court, in reference to this very act, that it con-

templated and required both a map of general route and also a map of definite location.

“The Act of Congress not only contemplates the filing” * * * “of a map showing the definite location of the line of its road,” * * * “but it also contemplates a preliminary designation of the general route.”

Buttz v. N. P. R. R. Co., 119 U. S., 55, 71.

And again in *United States v. Southern Pacific R. R. Co.*, 146 U. S., 570, the Court says (p. 600):

“Congress provided for two separate matters; one the fixing of the general route, and the other the designation of the line of definite location.”

The uniform holding has been that under an approved map of general route no interest whatever in the lands passes to the Company. The clear distinction between the effect of a map of general route and a map of definite location has been so often restated by this Court as hardly to bear a reference to it on the brief.

Thus, in *Menotti v. Dillon*, 167 U. S., 703, 720, the Court says:

“The filing of the map of general route gave the railroad company no claim to any

“ specific lands within the exterior limits
 “ of such route on either side of the road,
 “ the rule being that a grant of public lands,
 “ in aid of the construction of a railroad,
 “ is, until its route is established, in the
 “ nature of ‘a float,’ and title does not attach
 “ to specific sections until they are identified
 “ by an accepted map of definite location of
 “ the line of road to be constructed.”

In *Northern Pacific R. R. v. Sanders*, 166 U. S.,
 620, 634, the Court says:

“ The Company acquired, by fixing its
 “ general route, only an inchoate right to
 “ the odd-numbered sections granted by Con-
 “ gress, and no right attached to any specific
 “ section until the road was definitely located
 “ and the map thereof filed and accepted.
 “ Until such definite location it was compe-
 “ tent for Congress to dispose of the public
 “ lands on the general route of the road as
 “ it saw proper.”

In *Kansas Pacific Co. v. Dunmeyer*, 113 U. S.,
 636, the Court says:

“ Whatever rights accrue to the company
 “ from the act of filing it accrue from filing it
 “ there [at the Land Office]. What are those
 “ rights? This action does not, like the filing
 “ of the line of definite location, vest in the
 “ company a right to any specific piece of
 “ land. It establishes no claim to any par-

" ticular section with an odd number. It
 " authorizes the Secretary to withdraw cer-
 " tain land from sale, pre-emption, &c."

Again in *St. Paul, M. N. R. R. Co. v. Greenhalge*, 26 Fed. Rep., 563, 565, the Court said :

" The complainant took nothing by the
 " withdrawal. A withdrawal passes no title.
 " It only prevents other titles from accruing."

Again in *United States v. Southern Pacific*, 146 U. S., 570, the Court says (p. 600) :

" The map which was filed on April 3,
 " 1871, was simply one of general route, and
 " therefore did not work a designation * * *
 " to which the Southern Pacific's grant at-
 " tached."

And in both the *Dunmeyer* case, and the *St. Paul* case in 139 U. S., page 1, the doctrine is re-affirmed that the only effect produced by a map of general route is to cause a withdrawal either executive or legislative, and that the effect of the withdrawal is only to preserve the then public lands as against *subsequent* claims and dispositions except such as may be permitted by the granting act. But, as has been already observed, before this map of general route was filed, the title of the Oregon Company had become perfect by its granting act, definite location and actual

construction of road, subject only to being defeated by the possibility—which never was realized—of a definite location over the same ground by the Northern Pacific, under its prior grant of 1864.

It is too well settled for argument that a filing of a map of general route confers upon the Company no interest legal or equitable in any of the land opposite the line shown upon the map. Its effective operation is merely of a negative and prohibitive character. It merely prohibits subsequent disposals of the land by prescribed methods of sale, entry or pre-emption, but does not give to or confer upon the Company any right, title or interest whatever in the lands, which can only be acquired by definite location or construction according to the various provisions of the different acts. The lands involved still remain lands of the United States. The status of the lands, so far as legal and equitable interests therein or in respect thereto are concerned, is precisely the same as before the filing of the map and the issuing of the withdrawal order.

Nothing was done or resulted from what was done, in filing a map of general route or securing a withdrawal order, except that the lands lying

within the prescribed limit opposite the designated line had ceased to be liable to sale, entry or pre-emption.

At all events, the title of the Oregon Company had already vested in the lands in controversy, and a reservation by withdrawal for the Northern Pacific which never culminated in definite location could not affect the Oregon Company's title to the land.

SIXTH POINT.

All rights accruing upon the filing of the Map of August, 1870, so far as the line west of the mouth of the Walla Walla River was concerned, depended upon the Joint Resolution of 1870, and in respect to that portion of the Northern Pacific line the Oregon Company's grant of 1866 was the prior grant. This brings the case precisely within the rule established in the Musser-Sauntry Case, 168 U. S., 604.

The map of the Northern Pacific of August, 1870, even as a map of general route, was never authorized by the Act of 1864, but only by the Joint Resolution of May 31, 1870, prior to which the title of the Oregon Company to the lands in question had become absolutely perfected by its granting act and definite location. This map was filed after and in pursuance of the authority contained in the Joint Resolution of 1870 and can find no warrant in the Act of 1864.

Under the Act of 1864 the Northern Pacific Railroad Company was authorized to build and maintain *a continuous railroad and telegraph line*

from a point on Lake Superior to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, leaving the main trunk line not more than 300 miles from its (the main line's) terminus. This plan is perfectly clear. A main trunk line to Puget Sound and a branch from a point not exceeding 300 miles east of the Puget Sound terminus to a point at or near Portland.

Up to 1870 nothing in the way of construction had been done.

Perham's relation to the matter is aptly described by Jay Cooke as follows :

“ Mr. Perham had a unique idea. He proposed to build a railroad without bonds, and to obtain the capital by selling the stock in small lots throughout the country—to make a sort of national penny subscription to build a great transcontinental railroad. Of course, Mr. Perham's Utopian scheme fell through.”

No substantial steps toward the construction of the road were taken until after the passage of the Joint Resolution of 1870. Except the Perham map of 1865, nothing even on paper was presented by the Company, and that map, as has already appeared, was a wholly unauthorized

map by which the Company seems to have sought to diverge from the route pointed out by the Act of 1864 and to carry *its main line by way of Portland to Puget Sound and back across the Cascade Mountains to a point on the main line in Washington Territory.*

By resolution April 10, 1869 (16 Statutes, 57), the Northern Pacific Company was authorized to extend its branch line *from Portland to Puget Sound* and to connect the same with its main line west of the Cascade Mountains in Washington, but this resolution of Congress gave no subsidy or land grant on the extension, except the mere right of way. Congress thus far kept clearly distinct as features of the railroad plan the main line direct to Puget Sound and the branch line, to a point at or near Portland, and then by the resolution of 1869 authorized an extension of the branch line from Portland to Puget Sound, but this concession of 1869 seems never to have been accepted by the Company, probably because of its lack of land grant on the extension.

So that as the matter stood prior to the passage of the Joint Resolution of May 31, 1870, the Company had no right whatever to build *its main line down the Columbia River to Portland.* The

Company had acquired no rights up to this time in any lands opposite the Columbia River except the right of selection and location if it should ever see fit to avail itself of them by definitely locating its line under the Act of 1864. It was apparent that without further legislation the whole scheme was likely to fail. Money could not be raised without the power to mortgage, which was not given by the resolution of April 10, 1869, authorizing the extension of the branch line. So Congress, taking the Northern Pacific Railroad Company as it found it, passed the resolution of May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes," as a new and independent piece of legislation not enacted as, or purporting to be, an amendment of the Act of 1864, and now, for the first time, the Northern Pacific acquired the right to mortgage its property and *to build its main line to some point on Puget Sound via the Valley of the Columbia River with the new right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.*

Meantime, however, Congress had passed the Acts of May 7, 1866 (14 Statutes, 355); July 1, 1868 (15 Statutes, 255); and May 4, 1870 (16 Statutes, 94), the latter of which acts was involved in the case in 152 U. S.; and the time for the completion of the Northern Pacific road had been extended until July 4, 1877.

This Northern Pacific Joint Resolution of 1870, we submit, presented an entirely new scheme of railroad in the locality we are considering west of the point of junction in Washington Territory. It authorized a different line entirely from the Act of 1864. That act provided for *a main line to Puget Sound*, but not via the Columbia River, because the *branch line* was to run from a point not more than 300 miles from the western terminus of the main line, down that valley to a point at or near Portland. But the Joint Resolution of 1870 provides only *for its main road to some point on Puget Sound via the Columbia River, and its branch from some convenient point on its main trunk line to Puget Sound*, irrespective of distance or locality of junction or terminus.

As to the route west of the junction point the Act of 1870 provided a wholly different plan from

that of 1864. The map of 1870, as it shows upon its face, was filed under it. It indicates the new authorized line of the main road without any indication of the branch.

Under the Act of 1864 the Company had power to designate by a map of general route a main line across the Cascade Mountains direct to Puget Sound, and to designate by a similar map a branch line along the Columbia River to a point at or near Portland only. If the map of August 13, 1870 (Map No. 333), had been filed as a map of either the main line or branch under the Act of 1864, it must have been rejected, and no withdrawal could possibly have been had or ordered under it. It was in reference to this very change of route effected by the Joint Resolution of 1870 that the Court in *U. S. v. Northern Pacific R. R. Co.*, 152 U. S., 284, 294, said :

“ We cannot agree that this resolution is
“ to be held, in this respect, as simply a
“ recognition by Congress of an existing
“ right, in the company, to locate and con-
“ struct a road from Portland to Puget
“ Sound, with the right to obtain lands, in
“ aid thereof, as provided in the Act of 1864.
“ On the contrary, it should be regarded as
“ giving a subsidy of lands in aid of the

“ construction of a *new* road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound.”

And it reaffirms the decision of Mr. Justice Lamar, when Secretary of the Interior, to the same effect, who said (p. 295):

“ By this resolution the designation of the lines of the road were changed ; that which by the granting act was known as the branch line (via the valley of the Columbia River to a point at or near Portland in the State of Oregon) was changed to main road, or main line, and that which had been designated as main line (across the Cascade Mountains to Puget Sound) was changed to branch line. So, by the joint resolution of 1870, the company was authorized to locate and construct its main line via the valley of the Columbia River, through some point at or near Portland, Oregon, to a suitable point on Puget Sound, with the privileges, grants, and duties provided for in its act of incorporation.”

It is true that the case in 152 U. S. involved only the question of the right of the Northern Pacific Company to lands lying on the line between Portland and Puget Sound, in respect to which it had under the Act of 1864 no possibility of

acquiring any right, but the opinion of the Court is unmistakable as to the complete change of scheme, route and terms, west of the point of junction in Washington Territory worked by the Joint Resolution of 1870, and we cite it not as an authority that the Northern Pacific, without the Joint Resolution of 1870, could not have located a branch line of road down the Columbia River from Wallula to a point at or near Portland, but to establish our proposition that when, after accepting the Joint Resolution of 1870, it filed its map of general route, it filed it under and intending to avail itself of the rights given by the Joint Resolution and not under the rights conferred by the Act of 1864. In the meantime the title of the Oregon Company to the lands involved in this suit had become by its grant and definite location absolute, just as the title of the Oregon Central had become absolute in the case in 152 U. S.

Indeed, we submit with confidence that the Northern Pacific Railroad Company having done nothing whatever under the Act of 1864 by which any lands were reserved for, or acquired by, it, having up to 1870 wholly failed to prosecute its undertaking contemplated by that

Act, and having then procured the passage of the Joint Resolution of May 31, 1870, and accepted its terms and proceeded thereunder by filing its map of general route, must be conclusively deemed to have accepted the terms of the Joint Resolution as superseding and taking the place of the Act of 1864 and the grant therein contained, so far as the route west of the junction point between branch and main line is concerned.

By the Joint Resolution which it accepted it acquired additional land grant, new powers of dealing with its land grant—namely, to mortgage it—and an extension of time for building. It procured and accepted the Joint Resolution with the knowledge that since the passage of the Act of 1864, while by its supineness and inaction all the land on its route had been left open and unreserved, a grant had been made by the United States to the Oregon Company of the right to construct its road from Portland southerly to the California line, with a similar land grant which might and probably would overlap its own land grant near Portland in the event of its finally locating its own road there. And when it accepted the Joint Resolution and

the rights thereby conferred and especially the special clause of indemnity contained in the Joint Resolution of the amount of lands that have been "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the Act of July 2, 1864," which must have related to the grant to the Oregon Company, which, in the meantime, had gone on and located and built its road, it could not afterwards claim that, by the subsequent filing of its map of general route or any other proceedings that it might take under the Joint Resolution, it would acquire any rights except those accorded to it by the Joint Resolution as a new and independent enactment. Indeed, the right to build the line of road and the branch authorized by the Act of 1864 was entirely abrogated and repealed by the resolution of 1870, so far as the change from branch to main line and from main line to branch and the extension are concerned. All this power and authority to build its main line and its new branch was thereafter dependent upon and derived from the resolution of 1870, and any attempt on its part, or on the part of the Government standing in its shoes by forfeiture, to attach

the map of general route filed after the acceptance of the Joint Resolution of 1870 to the Act of 1864 must and ought to fail.

SEVENTH POINT.

The provisions of the Northern Pacific Act of 1864 and Joint Resolution of 1870 concerning the grant through Territories and the grant through States respectively.

If the case did not seem entirely clear upon other grounds, we should strongly urge upon the Court the question whether, upon a proper construction of the Northern Pacific Act of 1864 and the Joint Resolution of 1870, the Northern Pacific Company would be entitled to lands in any other State or Territory than that in which its line opposite the lands was located, or, if so, whether lands forty miles in width could be acquired in a State by locating the railroad line on the territorial side of a boundary line between a State and a Territory, as was done in this case.

The grant under the Act of 1864 is of

“ every alternate section of public land not
“ mineral designated by odd numbers to the
“ amount of twenty alternate sections per
“ mile on each side of said railroad line as
“ said Company may adopt through the Ter-
“ ritories of the United States, and ten alter-
“ nate sections of land per mile on each side

“ of said railroad wherever it passes through
 “ any State.”

The Joint Resolution provides that,

“ in the event of there not being *in any*
 “ *State or Territory in which said main*
 “ *line or branch may be located* at the time
 “ of the final location thereof the amount of
 “ lands per mile granted by Congress to said
 “ Company within the limits prescribed by
 “ its charter, then said Company shall be en-
 “ titled under the directions of the Secretary
 “ of the Interior to receive so many sections
 “ of land belonging to the United States and
 “ designated by odd numbers *in such State*
 “ *or Territory* within ten miles on each side
 “ of said road beyond the limits prescribed
 “ in said charter as will make up such de-
 “ ficiency on said main line or branch, except
 “ mineral and other lands as excepted in the
 “ charter of said Company of 1864, to the
 “ amount of the lands that have been
 “ granted, sold, reserved, occupied by home-
 “ stead settlers, pre-empted or otherwise dis-
 “ posed of subsequent to the passage of the
 “ Act of July 2, 1864.”

The question which arises in this case, so far as
 the Act of 1864 is concerned (and independently
 of the legislative construction of that Act by the
 Joint Resolution of 1870), is whether the term
 “through the Territories of the United States”

is to be deemed to relate to the location of the 20 alternate sections per mile granted, or to the location of the railroad line which should be adopted by the Company. It is true that the juxtaposition of these words might seem to indicate that the location of the railroad line was referred to, but certainly the whole sense of the thing would seem to indicate that the words "through the Territories of the United States" related to the location of the granted sections, and that while a swath of 80 miles in width was to be granted in Territories a swath of only half that width was to be granted in States. There certainly could be no good reason why a location of the road as, in this instance, on the north side of the Columbia should draw 80 miles in width and a location less than a mile distant on the south side of the river should draw only 40 miles in width from substantially the same lands. This Act of 1864, sensibly construed, meant to make the location of the lands and not the location of the line the test of the width of the grant.

This seems to be made clear by the provisions of the Joint Resolution of 1870 quoted above, by which the granted lands therein referred to are limited to *the State or Territory in which, the*

land is located, which was of course proper, in order that the 40-mile Territorial or the 20-mile State limit should be uniformly applicable at each particular point on the line.

It is to be remembered that when the Map of August 13, 1870, was filed, the Joint Resolution had been passed and accepted by the Company, and that it really furnished the only basis upon which any substantial action was ever taken by the Northern Pacific Railroad Company in respect to the construction of its road.

We submit that it would be a most anomalous and unreasonable construction of these provisions of law that the Northern Pacific Railroad Company, by putting its road on the north bank of the Columbia River, could draw to a limit of forty miles in the State of Oregon and forty miles in the Territory of Washington; whereas, by locating its road less than a mile further south (where the road of the Oregon Railway and Navigation Company—the only road ever constructed between the points under consideration—was actually constructed), it would draw only within a twenty-mile limit in the State of Oregon and a twenty-mile limit in the Territory of Washington.

Obviously the location of the lands, and not

the location of the line, was to control, and the belt of lands was to be found either wholly in a State or wholly in a Territory; if the lands within the prescribed limits of the State or Territory were insufficient a further indemnity belt ten miles in width was provided under the Joint Resolution of 1870.

EIGHTH POINT.

Whatever may be the judgment of the Court with respect to the claims and rights of the Oregon Company, no judgment should be rendered against the defendants Hurlburt and Andrews, who are shown by the bill to be bona fide holders for value and without notice under conveyances from the company dated respectively in 1879 and 1880, and to have been in possession ever since and made valuable improvements thereon; nor should any judgment be rendered which could prejudicially affect the rights of the other purchasers from the Oregon Company of any of the lands involved in the suit.

Of the 220,000 acres claimed in the suit, 61,336 acres are shown to be thus held by *bona fide* purchasers.

Surely, the Act of 1896 must protect these *bona fide* purchasers from any cancellation of their deeds held under the patents. The Act of 1896 expressly provides that no patent to any lands held by a *bona fide* purchaser shall be affected or annulled, but the right and title of such purchasers is

thereby expressly confirmed. This act would seem to have been passed with direct and immediate reference to cases like the present, and as a remedial statute it necessarily applies to pending cases and controls the final judgment therein.

The decree of the Circuit Court, rendered September 9, 1895, vacated and annulled the several patents issued to the Oregon and California Railroad Company for the lands in controversy herein, or any of them, and adjudged that the deeds to Hurlburt and Evans respectively were null and void and canceled them.

The decree of the Circuit Court of Appeals, rendered October 19, 1896, reversed the decree below and directed the dismissal of the bill.

By the Act of March 2, 1896, it is provided and declared, as has been seen, that no patent to any of the lands herein, held by any *bona fide* purchasers, shall be vacated or annulled, and the right and title of such purchasers, and every of them, in and to such patented lands is confirmed by the United States.

This Court will act upon the provisions of law in the Act of 1896, in respect to the rights of *bona fide* purchasers of the lands, or any of them, involved in this suit, agreeably to the well-settled

principles in regard to such competent legislation passed pending the final determination of a cause.

Pennsylvania v. Wheeling Bridge Co., 18 How., 421.

The Clinton Bridge, 10 Wall., 454.

Ex parte McCardle, 7 Wall., 514.

Railroad v. Grant, 98 U. S., 399.

U. S. v. The Peggy, 1 Cranch, 103.

Yeaton v. U. S., 5 Cranch, 281.

Sch. Rachel v. U. S., 6 Cranch, 329.

State v. Norwood, 12 Md., 195.

The precise question seems to be disposed of by the decision of the Court in this case of *United States v. Winona, &c., R. R.*, 165 U. S., 463, in which Mr. Justice BREWER, speaking for the Court and referring to the Act of 1896, says, at pages 476-7:

“ It is true this act was passed after the
 “ commencement of this suit—indeed, after
 “ the decision by the Court of Appeals—but
 “ it is none the less an act to be considered.
 “ There can be no question of the power of
 “ Congress to terminate, by appropriate legis-
 “ lation, any suit brought to assert simply
 “ the rights of the Government. This suit
 “ was instituted by the Attorney-General in
 “ obedience to the direct command of Con-
 “ gress, as expressed in the Act of 1887, and
 “ Congress could at any time prior to the final
 “ decree in this Court direct the withdrawal

“ of such suit; and it accomplishes practically
 “ the same result when, by legislation within
 “ the unquestioned scope of its powers, it
 “ confirms in the defendants the title to the
 “ property which it was the purpose of the
 “ suit to recover. * * _ * It [the Act
 “ of 1896] not only declares that no patents
 “ to any lands held by a *bona fide* purchaser
 “ shall be vacated or annulled, but it confirms
 “ the right and title of such purchasers.
 “ Given a *bona fide* purchaser, his right and
 “ title is confirmed, and no suit can be main-
 “ tained at the instance of the Government
 “ to disturb it.”

And at page 481:

“ Our conclusion is that these acts operate
 “ to confirm the title to every purchaser from
 “ a railroad company of lands certified or
 “ patented to or for its benefit, notwithstand-
 “ ing any mere errors or irregularities in the
 “ proceedings of the land department, and
 “ notwithstanding the fact that the lands so
 “ certified or patented were, by the true con-
 “ struction of the land grants, although
 “ within the limits of the grants, excepted from
 “ their operation, providing that he purchased
 “ in good faith, paid value for the lands, and
 “ providing, also, that the lands were public
 “ lands in the statutory sense of the term, and
 “ free from individual or other claims.”

This Court, in the leading and celebrated case
 of the *Wheeling Bridge (supra)*, on May 27, 1852

made a decree declaring the bridge a nuisance, and directing the obstruction to be removed, but on August 31, 1852, Congress passed an act declaring the bridge to be a lawful structure, and "shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding."

This Court, on motion for process to enforce its decree, held that, by the Act of 1852, the bridge had ceased to be a nuisance, and denied the motion.

Mr. Justice NELSON, speaking for the Court, said (p. 430):

"So far, therefore, as this bridge created
 "an obstruction to the free navigation of the
 "river, in view of the previous acts of con-
 "gress, they are to be regarded as modified
 "by this subsequent legislation; and,
 "although it still may be an obstruction in
 "fact, is not so in the contemplation of
 "law. * * *

"But it is urged, that the act of congress
 "cannot have the effect and operation to
 "annul the judgment of the court already
 "rendered, or the rights determined thereby
 "in favor of the plaintiff. This, as a
 "general proposition, is certainly not to
 "be denied, especially as it respects adjudi-
 "cation upon the private rights of parties.

“ When they have passed into judgment,
 “ the right becomes absolute, and it is the
 “ duty of the court to enforce it.

“ The case before us, however, is distin-
 “ guishable from this class of cases, so far
 “ as it respects that portion of the decree
 “ directing the abatement of the bridge. Its
 “ interference with the free navigation of the
 “ river constituted an obstruction of a public
 “ right secured by acts of congress. * * *

“ Now, we agree, if the remedy in this
 “ case had been an action at law, and a judg-
 “ ment rendered in favor of the plaintiff for
 “ damages, the right to these would have
 “ passed beyond the reach of the power of
 “ congress. It would have depended, not
 “ upon the public right of the free naviga-
 “ tion of the river, but upon the judgment
 “ of the court. The decree before us, so far
 “ as it respects the costs adjudged, stands
 “ upon the same principles, and is unaffected
 “ by the subsequent law. But that part of
 “ the decree, directing the abatement of the
 “ obstruction, is executory, a continuing de-
 “ cree, which requires not only the removal
 “ of the bridge, but enjoins the defendants
 “ against any reconstruction or continuance.
 “ Now, whether it is a future, existing or
 “ continuing obstruction depends upon the
 “ question whether or not it interferes with
 “ the right of navigation. If, in the mean-
 “ time, since the decree, this right has been
 “ modified by the competent authority, so

“ that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree. * * *

“ And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment ? ”

In the case of the *Clinton Bridge* (10 Wall., 454, 462) the Act of Congress was passed pending the suit in the Circuit Court.

Mr. Justice NELSON said (p. 463):

“ In the present case the act of Congress having passed pending the suit, it gave the rule of decision for the court at the final hearing upon the same principle that the act in the *Wheeling Bridge* case staid the execution of the decree directing its abatement. The court say in that case that if the remedy had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the power of Congress.”

In the case of *Railroad v. Grant*, 98 U. S., 398,

a writ of error was sued out December 6, 1875, the Supreme Court having jurisdiction of cases in which over \$1,000 were involved. February 25, 1879, Congress raised the jurisdictional amount to \$2,500. Held, that the writ should be dismissed, jurisdiction having been taken away.

The Court, citing authorities, said it was (p. 401)

“ well settled that if a law conferring jurisdiction is repealed without any reservation
 “ as to pending cases, all such cases fall with
 “ the law.”

The pertinent doctrine was declared by the Court, speaking by Chief-Justice MARSHALL, in the early case of *The Peggy* (1 Cranch, 103), where the convention with France of December 21, 1801, after the decree of condemnation in the Circuit Court, and pending the case in this Court, was held binding upon the Court, and to require the reversal of the decree below.

The Chief-Justice said (p. 109) :

“ It has been urged * * * that the
 “ Judges can only inquire whether the sentence was erroneous when delivered, and
 “ that if the judgment was correct, it cannot
 “ be made otherwise by anything subsequent
 “ to its rendition. * * *

“ Yet to condemn a vessel, the restoration
 “ of which is directed by a law of the land,
 “ would be a direct infraction of that law,
 “ and, of consequence, improper.

“ It is in the general truth that the prov-
 “ ince of an appellate court is only to in-
 “ quire whether a judgment, when rendered,
 “ was erroneous or not. But if, subsequent
 “ to the judgment and before the decision of
 “ the appellate court a law intervenes and
 “ positively changes the rule which governs,
 “ the law must be obeyed, or its obligation
 “ denied. If the law be constitutional, and of
 “ that no doubt in the present case has been
 “ expressed, I know of no court which can
 “ contest its obligation.” * * *

In the case of *State v. Norwood* (12 Md., 195)
 the Stamp Act having been repealed, and all un-
 stamped contracts having been declared valid by
 the Legislature, it was held to be the duty of an
 appellate court to reverse the decision of an
 inferior Court made before the repeal, excluding
 evidence of an unstamped contract.

The operation of the Act of March 2, 1896,
 cannot, of course, be affected by the principles
 upon which effect was denied to the legislation
 before the Court in *U. S. v. Klein* (13 Wall., 128),
 by which Congress passed the limit separating
 the legislative from the judicial power, and

also infringed the constitutional power of the Executive.

In that case the Court said at p. 146 :

“ We do not at all question what was decided in the case of *Pennsylvania v. Wheeling Bridge Co.* In that case, after a decree in this Court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road ; and the Court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion.

“ No arbitrary rule of decision was prescribed in that case, but the Court was left to apply its ordinary rules to the new circumstances created by the act.”

The claim has been asserted by the United States that no one is to be deemed or considered a *bona fide* purchaser within the meaning of the Act of 1896, except persons who are *bona fide* purchasers without actual or constructive notice of error in the action of the Interior Department in issuing patents or certifying lands — that is to say, purchasers are to be charged (constructively of course) with knowledge of every fact appear-

ing of record in the Interior Department, and with accurate knowledge as to the precise legal effect and operation of the various Acts of Congress, which have been the subject of such varying and divergent views in the Interior Department, and so much discussion and difference of opinion before and in the Courts of the United States.

This view, of course, necessarily involves completely setting at naught and disregarding the intention and purpose of Congress in adopting this remedial legislation in reference to the rights of *bona fide* purchasers, nor does it rest at all upon a correct or reasonable interpretation of the language of the statutes, as is clearly shown by the opinion in the *Winona* case above cited.

The Court is very familiar with the questions which have been so much litigated before it as to the classes of cases in which *bona fide* purchasers of patented lands without notice acquired good title as against the United States. It is familiar with the questions discussed in that connection as to the extent to which purchasers of patented lands are to be deemed to be charged with constructive notice of records in the Interior Department, or with accurate knowledge as to the correct

legal interpretation of statutes involved. It is also familiar with the questions which have been there discussed as to the cases in which the action of the Interior Department, though erroneous, was within the jurisdiction of the department, and those cases in which the action of the Interior Department was without or beyond the jurisdiction of the department, and therefore was to be treated as wholly inoperative and void.

The purpose of Congress in its remedial legislation in respect to *bona fide* purchasers, in the Acts of 1887 and 1896, seems to be clear and obvious. It was not adopted for the purpose of perpetuating as against purchasers of patented or certified lands these controversies, predicated upon the application of legal principles affecting the extent or limits of the authority or jurisdiction of the Interior Department or equitable principles applicable to the cases of *bona fide* purchasers without notice, but it was to establish in favor of purchasers of lands which had been theretofore patented or certified by the United States the clear principle that if their purchases had been made honestly and in good faith for the purpose and with the expectation of acquiring title to the property, their titles should stand confirmed, and

the United States would look alone to such remedies as might be reserved by it against the companies to or in favor of which patents or certifications had been executed. The whole purpose of the legislation was to relieve the purchaser himself from the controversies and contestations which had necessarily arisen in connection with the application of existing legal and equitable principles to the cases of transferees of lands which had been erroneously patented or certified by the United States.

The theory of the Government now seems to be that this remedial legislation, which is, of course, to be liberally construed, should be effaced and obliterated, and that no one should be now entitled to claim the benefit of these statutes as *bona fide* purchasers, except such purchasers as under pre-existing rules and principles, as recognized or established by the decisions of this Court, were entitled to keep the land, notwithstanding the erroneous action of the Interior Department in patenting or certifying it.

In view of the decision in the Winona Railroad Case, 165 U. S., 463, discussion of this subject seems to be hardly requisite; the purpose of the remedial legislation seems

perfectly clear, and the meaning of the language employed conforms with that purpose.

As the Court very well knows, equitable rights were held to attach in certain classes of cases heretofore considered by this Court in favor of persons who were to be deemed to be *bona fide* purchasers of the land without notice of the errors made by the Interior Department in patenting and certification. The Statute of 1896, as well as the Statute of 1887, wholly ignores the element of notice, and extends the benefits of their provisions to all persons who are *bona fide* purchasers; that is to say, to honest purchasers, purchasers in good faith, without reference to the question of notice, except so far as actual notice might affect the question of good faith. No question of constructive notice as to records in the department, or constructive notice of the effect and operation of statutes as correctly construed, is applicable in the case of the *bona fide* purchasers in whose favor this remedial legislation has been adopted. If there has been *bona fides*, if the purchase has been made honestly—"without knowledge of wrong or error"—with the purpose and in the expectation of acquiring title—that

determines the whole question, and no residuum of controversy is left as to constructive notice or theoretical knowledge of the contents of the records of the Interior Department, or theoretical presumption of knowledge of the law as it may be declared by this Court.

Measured by these standards, the evidence in this case shows that not only Hurlburt and Andrews, but all the purchasers of these lands from the Company, were *bona fide* purchasers of the lands involved, and we submit that this Court should so hold, and recognize the confirmation of these titles established by the Act of 1896.

The patents so far as they relate to lands which are held by *bona fide* purchasers, cannot be vacated or annulled by a decree in the present suit, and any and all patented lands involved in this suit held by such *bona fide* purchasers should in any event be expressly excepted from any decree otherwise vacating or annulling any such patents.

These suggestions in respect to the effect and operation of the Act of 1896 upon their lands are submitted on behalf of Hurlburt and Andrews and all the numerous purchasers of lands involved in this suit.

NINTH POINT.

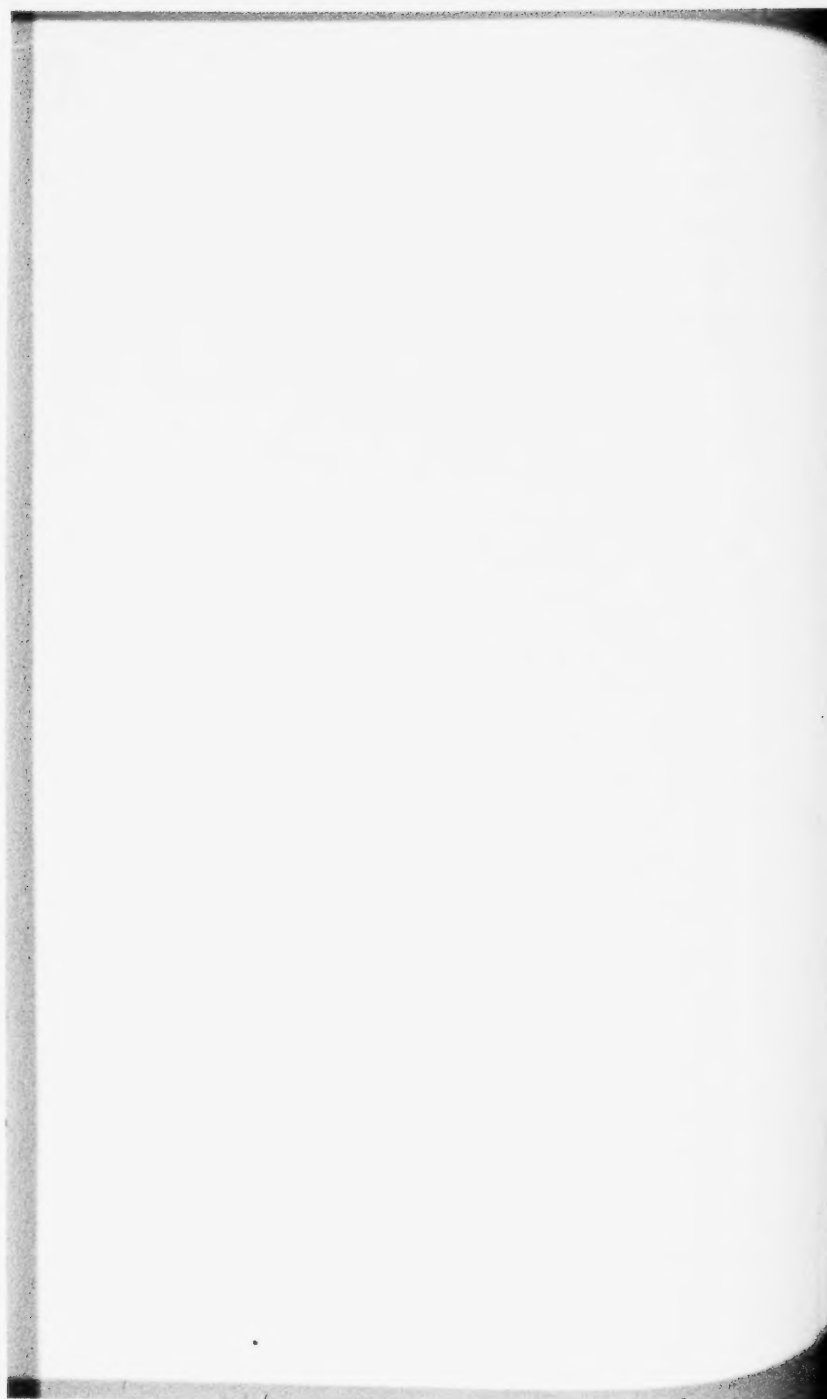
The decree of the Court below should be affirmed with costs.

JOSEPH H. CHOATE,

LEWIS E. PAYSON,

CHARLES H. TWEED,

Of Counsel.



N. 52. 9.

Brief of Payson & Twerd for Appellants

OFFICE SUPREME COURT U. S.
FILED
APR 13 1899
JAMES H. KENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed April 12, 1899.

No. 52.

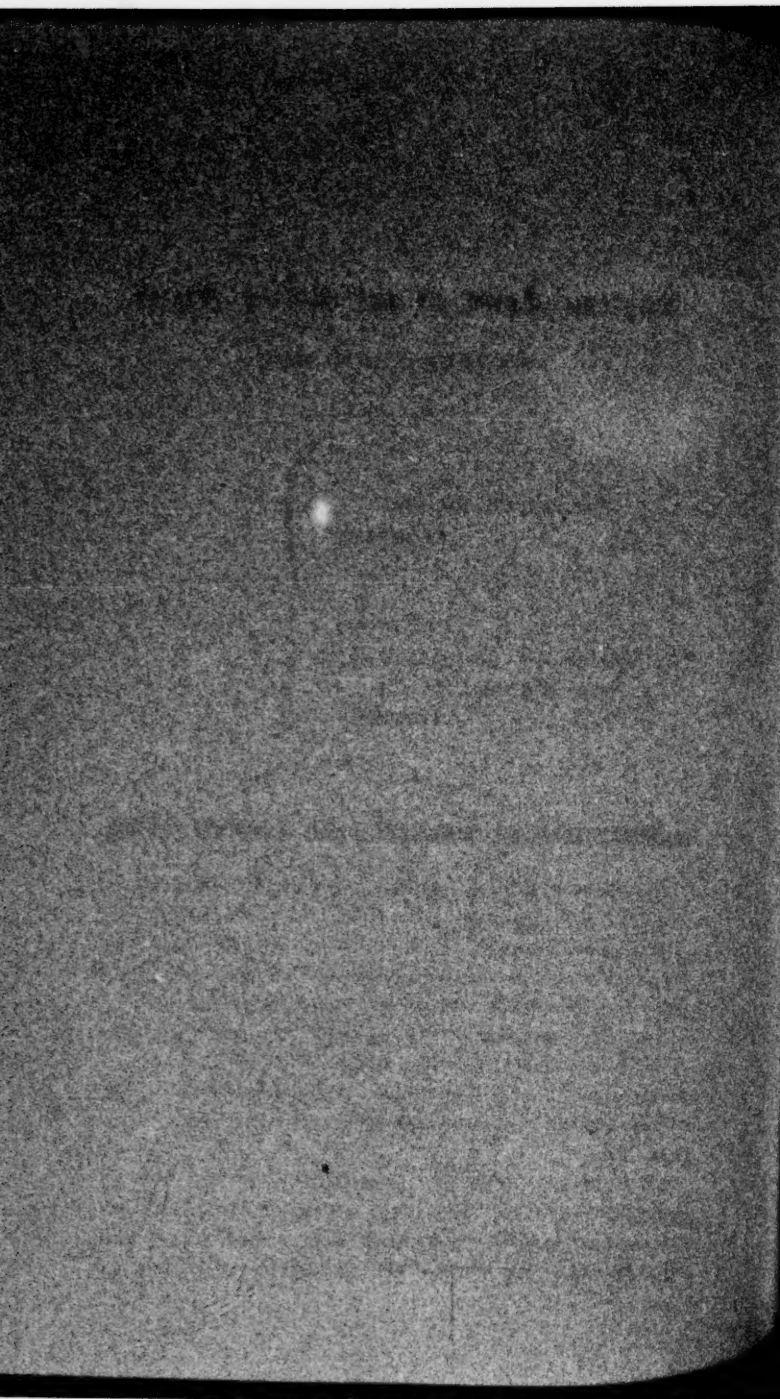
THE UNITED STATES,
Appellant,

vs.

THE OREGON AND CALIFORNIA RAILROAD
COMPANY ET AL.,
Appellees.

ADDITIONAL BRIEF FOR APPELLEES.

LEWIS E. PAYSON,
CHARLES H. TWERD,
Of Counsel for Appellees.



Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 52.

THE UNITED STATES,
Appellant,

VS.

THE OREGON AND CALIFORNIA RAIL-
ROAD COMPANY ET AL.,
Appellees.

ADDITIONAL BRIEF FOR APPELLEES.

The necessity for presenting this additional brief on behalf of the appellees arises from the following facts :

A printer's proof of part of the brief for appellant was served on the appellees on Wednesday, 5th inst., after this case had been set for hearing on that day.

On the evening of the 6th inst., by letter from the Solicitor General, the appellees were notified of an additional point to be made and argued in the brief, which now appears as Point XIV. of Appellant's Brief, page 83.

The printed brief for appellant was handed to appellees on the 7th inst.; but anticipating that the case might possibly be reached for argument by the 7th, the brief which had been prepared on behalf of

the appellees upon the case generally, as argued below, was printed without opportunity for reply therein, either to the additional Point XIV. made for the first time here, in appellant's brief, or to the other portions of that brief.

This statement is in no wise made in criticism of the Solicitor General (who has shown us every courtesy in connection with the case), but simply in explanation of our presenting an additional brief at all.

In reply to the additional Point XIV. of appellants' brief, the following suggestions are submitted.

I.

The Sixth Point in our original brief (p. 138) is a complete answer to Point XIV. in the brief for the United States.

We have there shown that all rights accruing upon the filing of the Northern Pacific maps of August 13, 1870, so far as the line west of the mouth of the Walla Walla River was concerned, depended upon the Joint Resolution of 1870, and, in respect to that portion of the Northern Pacific line, the Oregon Company's grant of 1866 was the prior grant; which brings the case precisely within the rule established in the Musser-Sauntry case, 168 U. S., 604.

II.

But even if that were not the case, and the Northern Pacific grant should, even in respect to that portion of the road, be treated as being the prior grant, still

(there having been no definite location under the Northern Pacific grant) the title of the Oregon and California Railroad Company to the lands in its indemnity list patents is good.

At the date of the withdrawal for the Oregon Company under withdrawal order of January 31, 1870, the lands in suit were clearly "public lands" in the broadest sense of the words.

By the action of the Land Department in making this withdrawal, all the lands within its terms (which included all the lands in suit) were withdrawn for the benefit of the Oregon Company, and thereby became "reserved lands" in all that that term implies.

The act of the Secretary was in effect a reservation.

N. P. R. R. Co. vs. Musser-Sauntry, &c., Co.,
168 U. S., 604, and cases cited.

At the date of this withdrawal the rights of the Oregon Company, as to lands in place, were fully fixed, as between it and the United States, by its map of definite location of October, 29, 1869.

Losses of land "in place" were then ascertainable, and the orderly administration of the Oregon granting act required just what was done; viz., a withdrawal of all "public lands" affected by the grant.

It will be remembered, as we have shown, that up to this date no act of designation of either general route or definite location had been performed by the Northern Pacific Company, which in any way affected or could affect these lands, nor had any part of these lands been in any wise withdrawn under the Northern Pacific grant. So, as they still remained "public lands" in every sense of the words, they were, by Executive order of January 31, 1870, duly "withdrawn" for the benefit of the Oregon Company, and thus became "reserved lands," and subject to selection by the Oregon Company for its losses in its primary limits.

It does not appear by the record in the case when the *selections* were made and approved by the Secretary, but of course they were made and approved before the patents issued.

Non constat, but that the selections were made and the lists approved before August 13, 1870, the date of the map of general route of the Northern Pacific Company.

If so, any question involved in this suit is obviously eliminated, for, when the selections had been made and approved, title passed to the selecting company, and they could not be thereafter affected by a mere map of general route, nor any attempted withdrawal thereunder; certainly nothing short of a definite location under a prior grant could affect them; and no definite location was ever made by the Northern Pacific Company opposite to these lands.

But assuming that the selection by the Oregon Company was *subsequent* to August 13, 1870, it was none the less of lands theretofore placed in reservation for its benefit, and which could only be taken away from it, if at all, by definite location under a prior grant; which never took place.

The necessity for definite location to attach a grant to any specific lands, and the long established principle that a map of general route and a withdrawal thereunder do not in any wise affect the title to any specific lands, are fully discussed in the First Point (pp. 58-93) and the Fifth Point (pp. 122-137) of our original brief in this cause, and need not be further discussed in this connection.

III.

But even if it should be held that by reason of the filing of the Northern Pacific Maps of August 13, 1870, title to the patented lands within the indemnity belt of the Oregon Company did not vest in that company upon their original selection, nevertheless the patents for these indemnity lands will not be vacated, as the company since the passage of the Northern Pacific Forfeiture Act is entitled to perfect its title thereto by selection, and the Court will not cancel a patent made upon a selection which may have been unauthorized at the time when it was made if such selection is now authorized.

A. If it could be shown that the company may not have been entitled to select these lands when they were selected, should they be forfeited if in fact it is entitled to select them now? If the company is entitled to select and receive a patent for these very lands now, should the old patent be canceled? Must not the Government show that the patent to be canceled operates in some way to its detriment?

It is suggested with respect to these patented indemnity lands that, to entitle the Government now to a cancellation of a patent for the lands, it is not sufficient for the United States to show that the selection of the lands, as made before the passage of the Forfeiture Act, was erroneously approved by the Land Department, but it must also show that the Government has been *injured* in some way by reason of the selection and patenting of the lands to the company; and, if the company is now entitled to select and secure a patent for the same lands in its indemnity limits, it is difficult to see that the Government has sustained any injury from the patenting of these lands, and it is submitted that the patent should not now be canceled.

Lee vs. Johnson, 116 U. S., 50.

California vs. San Pablo, etc., R. R., 149 U. S., 314.

B. The right of the Oregon Company (if they had not already been patented to it) to select these lands within its indemnity limits subsequent to the passage of the Northern Pacific Forfeiture Act is beyond all doubt and question.

In *Ryan vs. Central Pacific R. R. Co.* (99 U. S., 382) the land at the date of the railroad grant was within the limits of a Mexican grant claim, but after the Mexican grant had been declared invalid the railroad company selected it under the indemnity provisions of its grant, and the land was patented to the company. The suit was prosecuted by the United States to cancel this patent.

The decision of the Supreme Court of the United States was rendered at the October Term, 1878. The Court said :

"The railroad company had not and could not have
 "any claim to it until specially selected, as it was, for
 "that purpose. It was taken to help satisfy the grant
 "to the extent that the odd sections originally given
 "failed to meet its requirements. When so selected
 "there was no Mexican or other claim impending over
 "it. It had ceased to be *sub judice*, and was no longer
 "in litigation. It was as much 'public land' as any
 "other part of the national domain. * * * The
 "Mexican claim when condemned lost its vitality.
 "From that time, as regards the future, it ceased to be
 "a factor to be considered, and was in all respects as
 "if it had never existed. In this state of things the
 "appellee acquired its title, and that title is inde-
 "feasible."

So here, when the land was restored to the public domain, the Northern Pacific grant and withdrawal ceased to be factors to be considered and the *status* of the land was in all respects the same as if there had never been a grant to or withdrawal for the Northern Pacific Company.

After the decision in the Ryan case the Interior Department conformed its action and decisions therewith.

Land excepted from withdrawal by the existence of a pre-emption claim is not excluded from subsequent selection, if at the date of such selection such claim has expired and been abandoned.

C., M. & St. P. Ry. Co. vs. Amundson, 8 L. D., 291.

Hensley vs. N. P. R. R. Co., 12 L. D., 19.

N. P. R. R. Co. vs. Templeton, 27 L. D., 543.

A tract of land is not excluded from indemnity selection by reason of being within the *primary* limits of another grant, if it is in fact vacant public land at date of selection and otherwise subject to such appropriation.

Allers vs. N. P. R. R. Co., 9 L. D., 452.

N. P. R. R. Co. vs. Halvorson, 10 L. D., 15.

N. P. R. R. Co. vs. Moling, 11 L. D., 138.

N. P. R. R. Co. vs. Bass, 13 L. D., 201.

St. P., M. & M. Ry. Co. vs. Munz, 17 L. D., 288.

Additional Suggestions in Reply to Appellant's Point V.

In reply to Appellant's Point V. (p. 28), we submit the following suggestions in addition to those presented in our original brief at page 99.

Appellant's Point V. is as follows:

"The words 'via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon,' used in the Act of July 2, 1864, locates the so-called branch line with sufficient certainty to identify the lands granted in aid of its construction, and thus preclude the junior grant in 1866 to the Oregon and California from attaching."

That is to say, that by the use of the words "via the valley of the Columbia River," the granted lands under the Northern Pacific act were identified, so that the title to these lands of necessity vested, by operation of the act itself, in the Northern Pacific Railroad Co.

This is certainly novel, not to say startling.

It ignores the plain provisions of the act, and the construction put upon it in numerous cases in this Court, notably the Buttz Case, 119 U. S., 55, that the statute contemplates two maps, one of general route, to protect the company, and the other of definite location, by which, and by which *only*, can the lands be identified so that title will attach.

Equally it ignores the same principle announced in every land grant case decided by this Court, where the question of initiation of title and identification of lands has been considered.

The proposition is that the line is self-locating, by the act.

The act provides that the line shall be selected and adopted by the company.

By every rule the location (whether general or definite) of a line under a railroad land grant must be the act of the company, and no identification of tracts can be had until a formal map of definite location of the line, based on surveys and tied to Government surveys or natural objects, is presented and approved.

With the map (No. 329) facing page 163 of the Transcript of Record before him, where would counsel say the line, as established by the act, would be?

On the north bank of the river? And where would it cross to reach Portland?

On the south bank? And where would it cross to reach the main line?

Or would it take either of the two eligible routes in the valley, north of the river, testified to by Haversham (pp. 122, 124, 127)?

What officer of the Government is authorized by the

act to say, or what officer could say, whether the company would prefer to locate the line in Washington Territory and claim a grant 80 miles wide, or locate it in Oregon and claim only a grant 40 miles wide ?

Again, the act provides that the branch shall leave "the main trunk line at the most suitable place not more than 300 miles from its western terminus."

Does the act fix either point—"the most suitable place" or "the western terminus" ?

Clearly, the fixing of these points requires human judgment and determination. The act provides that it shall be done by the company, and it is impossible that it could be otherwise done under the act and the uniform rules of construction of these grants.

Again, on page 31, it is said the gorge of the Columbia River is at "no place more than six miles wide."

That is the width of a township under regular survey, having 23,040 acres. Where, in the township, does the act locate the road ? It would make a difference of thirty townships in the Northern Pacific withdrawal in Oregon, if the line should be upon one, rather than the other, side of this gorge.

Again, on page 32, it is said : "It followed from this, that the road would be inevitably located on the north side of the Columbia River."

Why would it, by the act ? Most certainly some person must choose, whether it would be better to locate in a Territory, and claim a grant 80 miles wide, or in a State, and be content with one 40 miles wide.

As a matter of fact, the line subsequently located and constructed by the Oregon Railway and Navigation Company was on the south side of the river.

The uncertainty of all these situations shows clearly the absurdity of the point being considered.

Again, it is said (pp. 32 and 34) that existing natural conditions are such that notice was given to the Oregon and California Company that the lands in controversy were necessarily appropriated for the Northern Pacific Company, because the latter company could not reach a point at or near Portland without taking these lands under its grant.

Nothing could be more erroneous.

If your Honors will kindly take the map (No. 329), facing page 163 of the record, "Washington Territory," and the map (No. 350), facing page 169, Defendants Exhibit 2, and Haversham's evidence (pp. 122, 124, 127, 128), it will be perfectly apparent that there are two eligible railroad routes, feasible and practicable, from Wallula, or Pasco (the present point of departure of the Cascade Branch of the Northern Pacific), *via* the valley of the Columbia, in its main watershed, through easy passes in the mountains northeast of Portland as shown on the first-named map, and thence south *via* Vancouver, crossing the Columbia there; thence due south to Portland; either of these routes being adopted, not an acre of the land involved in this suit could have been taken by the Northern Pacific.

That Vancouver would be a suitable place for a crossing of the Columbia River is shown by the proofs that the Union Pacific Railroad Company have there constructed piers in that river for a bridge. The line of such road, by either of the routes described by Haversham, would reach Vancouver by a sweep round from the north, so that the line for 15 or 20 miles would be practically north and south; thence across the river, due south to a point at or near Portland, some eight miles more, making practically 25 miles of north-and-south road from Portland north.

Now, how would that grant be adjusted? The rule has been uniform in the Interior Department since the Illinois Central grant in 1850. The lateral limits are parallel to the line of road, following practically all its sinuosities by tangents to arcs of circles, the radius

being the width of the grant on each side of the line. This process fixes the lateral or side limits.

The line which marks the end of the grant at the end of the constructed road, or end of map of definite location, is called the "terminal line."

This terminal line is always at right angles to the end of the line of road, as shown by the map of definite location.

United States vs. Burlington, &c., R. R. Co., 98 U. S., 334.

United States vs. Oregon & California R. R. Co., 164 U. S., 526.

Look at Defendant's Exhibit Q, where the adjustments of two different grants by the Interior Department are shown.

The Oregon Central grant, where a large curve is made to the west of, and as the road approaches Portland; the terminal line, at right angles, at Portland.

Then the Oregon and California grant involved in this suit. The east and west "terminal line" at Portland, at right angles to the end of the map of definite location and constructed road, marks the northern limit of this grant.

Now, with the same map before your Honors, bring down the Northern Pacific line, as supposed under Haversham's evidence, from Vancouver, which is due north from Portland, the "terminal line" of the Northern Pacific grant would be an exact east and west line "at or near Portland," and every acre of land in dispute in this suit would lie south of it, and not affected by it.

This is as clear as that two plus two equal four, and disposes of the argument as to the necessary appropriation of the Oregon Company's land in case of building a road under the Act of 1864, to a point at or near Portland, via the valley of the Columbia River.

Respectfully submitted,

LEWIS E. PAYSON,

CHARLES H. TWEED,

Of Counsel.

**UNITED STATES *v.* OREGON AND CALIFORNIA
RAILROAD COMPANY.**

**APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.**

No. 9. Argued April 14, 1899. — Decided January 8, 1900.

By the act of July 2, 1864, 13 Stat. 365, c. 217, Congress granted lands to the Northern Pacific Railroad Company to aid in the construction of a railroad and telegraph line from a point on Lake Superior in Wisconsin or Minnesota to some point on Puget Sound, with a branch *via* the valley of the Columbia River to a point at or near Portland in the State of Oregon. The grant was of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the

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Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." In March, 1865, the president of that company filed in the Land Department a map which if of value for any purpose was only a map of "general route," not one of definite location between Wallula and Portland. That map was not accepted. By act of July 25, 1866, 14 Stat. 239, c. 242, Congress made a grant of land in aid of the construction of a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California. That grant was in the usual terms employed in such acts. Subsequently the benefit of that grant as to the part of the road to be constructed in Oregon was conferred upon the Oregon Central Railroad Company. The lands here in dispute, whether place or indemnity, were within the limits of the grant of 1866. The entire line of road of the Oregon and California Railroad Company, which was the successor of the Oregon Central Railroad Company, was fully constructed and duly accepted by the President, and at the time this suit was begun was being operated and had been continuously operated by that company. The Oregon Company filed its map of definite location in 1870, and it was accepted by the Land Department. By the act of September 29, 1890, 26 Stat. 496, c. 1040, all lands theretofore granted to any State or corporation to aid in the construction of a railroad opposite to or coterminous with the portion of any such railroad not then completed and in operation, for the construction of which such lands were granted, were forfeited to the United States. There never was any withdrawal of indemnity lands on the proposed line of the Northern Pacific Railroad Company between Wallula and Portland, nor was there any definite location or construction of its road opposite to the lands in suit. *Held,*

- (1) That nothing in the act of 1864 stood in the way of Congress subsequently granting to other railroad corporations the privilege of earning any lands that might be embraced within the general route of the Northern Pacific Railroad.
- (2) That as the grant contained in that act did not include any lands that had been reserved, sold, granted or otherwise appropriated at the time the line of the Northern Pacific Railroad was "definitely fixed;" as the route of the Northern Pacific Railroad had not been definitely fixed at the time the act of July 25, 1866, was passed, or when the line of the Oregon Company was definitely located; as the lands in dispute are within the limits of the grant contained in the act of 1866; as the route of the Oregon Railroad was definitely fixed, at least when the map showing that route was accepted by the Secretary of the Interior on the 29th day of January, 1870,—the Northern Pacific Railroad Company having done

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nothing prior to the latter date except to file the Perham map of 1865; and as prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there is no escape from the conclusion that these lands were lawfully earned by the Oregon Company and were rightfully patented to it. Of course, if the route of the Northern Pacific road had been definitely located before the act of 1890 was passed, and had embraced the lands in dispute, different questions would have been presented.

THE case is stated in the opinion.

Mr. Solicitor General for appellant.

Mr. L. E. Payson for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit involves the title to a large body of lands in the State of Oregon covered by patents issued by the United States to the Oregon and California Railroad Company, a corporation organized under the laws of Oregon. Its object is to obtain a decree cancelling those patents as well as certain conveyances made by the company.

The suit was brought by the Attorney General in 1893 under the authority of the act of March 3, 1887, c. 376, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes." By that act the Secretary of the Interior was directed to adjust, in accordance with the decisions of this court, each of the railroad land grants made by Congress to aid in the construction of railroads and theretofore unadjusted. Its second section provided that "if it shall appear, upon the completion of such adjustments respectfully, [respectively,] or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon

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demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States." 24 Stat. 556, c. 376.

The defendants demurred to the bill for want of equity, but the demurrer was overruled. 57 Fed. Rep. 890. They then filed a joint and several answer and proofs were taken by the parties. By the decree of the Circuit Court patents of May 9, 1871, July 12, 1871, June 22, 1871, and June 18, 1877, purporting to convey to the Oregon and California Railroad Company the lands in dispute (which are fully described by metes and bounds in the decree) were cancelled as being null and void. By the same decree a warranty deed of February 26, 1880, to the defendant John A. Hurlburt, a deed of November 5, 1879, to Jacob Goldstrap—each of which deeds was executed by the railroad company—a deed by Goldstrap to Sylvester Evans, and a deed from the latter to Thomas L. Evans of July 13, 1883, were also cancelled as null and void. 69 Fed. Rep. 899. The case was then carried to the Circuit Court of Appeals where the decree of the Circuit Court was reversed with directions to dismiss the bill. 77 Fed. Rep. 67.

The facts necessary to a clear understanding of the questions raised by the pleadings are as follows:

By an act approved July 25, 1866, c. 242, Congress authorized the California and Oregon Railroad Company, a California corporation, and such company as the legislature of Oregon should thereafter designate, to lay out, locate, construct, finish and maintain a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California—the Oregon Company to construct that part of the line in Oregon beginning at Portland and running thence southerly through the Willamette, Umpqua and Rogue River valleys to the

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southern boundary of Oregon, where it was to connect with the part constructed in California by the California corporation. 14 Stat. 239, 240, 241, c. 242.

For the purpose of aiding in the construction of such railroad and telegraph line and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line of the railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of the railroad line, were granted to those companies, their successors and assigns. If the alternate sections or parts of sections so granted were found to have been "granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of," other lands, designated as aforesaid, were to be selected by the companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, nearest to and not more than ten miles beyond the limits of the first-named alternate sections. It was made the duty of the Secretary of the Interior, as soon as the companies or either of them filed in his office a map of the survey of the railroad or any portion thereof, not less than sixty continuous miles from either terminus, to withdraw from sale the lands granted on either side of the railroad as far as located and within the limits specified. § 2.

Whenever the companies or either of them had twenty or more consecutive miles of any portion of the railroad and telegraph line ready for service, it became the duty of the President to appoint three commissioners to examine the same, and when it appeared that twenty consecutive miles of railroad and telegraph had been completed and equipped in all respects as required, the commissioners were to report the fact under oath to the President, whereupon patents were to issue for the lands granted to the extent of and coterminous with the completed section of the railroad and telegraph line; and from time to time whenever twenty or more consecutive miles of road and telegraph were completed and equipped, patents were to be issued upon the report of the commissioners, and so on until the entire railroad and telegraph authorized were constructed. § 4.

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The companies were required to file their assent to the act in the Department of the Interior within one year after its passage, and complete the first section of twenty miles of the railroad and telegraph within two years and at least twenty miles in each year thereafter, and the whole on or before the first day of July, 1875,—the railroad to be of the same gauge as the Central Pacific Railroad of California and connect therewith. § 6.

In case the companies failed to comply with the terms and conditions required by not filing their assent thereto as provided in section six of the act, or by not completing the same as provided in that section, the act was to be null and void, and all the lands not conveyed by patent to the company or companies, as the case might be, at the date of such failure, should revert to the United States; and if the road and telegraph line were not kept in repair and fit for use after the same were completed, Congress could pass an act to put them in repair and use and direct the income therefrom to be devoted to the United States to repay all expenditures caused by the default or neglect of the companies or either of them, or fix pecuniary responsibility not exceeding the value of the lands granted by the act. § 8.

It appears from the bill filed by the United States that, by joint resolution of October 20, 1868, the legislature of Oregon designated the Oregon Central Railroad Company to receive the privileges and franchises and to perform the duties mentioned in the act of July 25, 1866; that on the 29th day of October, 1869, that company, having previously accepted the grant contained in that act, filed with the Secretary of the Interior in its map of "definite location" opposite to the lands in suit; that this map was accepted by the Secretary on January 29, 1870; that in February, 1870, the lands in dispute were all withdrawn in pursuance of orders issued by that officer; that on or about April 4, 1870, the Oregon and California Railroad Company, a corporation of Oregon, became the successor and assignee of the Oregon Central Railroad Company; that the road of that company was duly constructed opposite the lands in dispute within the time limited

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by law for the completion of that portion; and that two sections of 20 miles each were examined by commissioners appointed by the President, and their report having been accepted by him patents for the lands coterminous with those sections were ordered to be and were issued.

The bill contained these averments: "Your orator shows that all the lands hereinbefore described are *within the limits of the grant as prescribed in said act of July 25, 1866, whether place or indemnity.* And your orator shows that *the entire line of railroad of the said Oregon and California Railroad Company has been fully constructed and been duly accepted by the President of the United States after due reports by commissioners on the several sections thereof, and has been continuously, and still is operated by said company;* but a portion of said road, to wit, one hundred and sixty-three miles, was constructed after July 1, 1880."

Referring to the conveyances made by the railroad company to the individual defendants, the bill admits that the purchasers went into actual possession, made valuable and permanent improvements and remained thereafter in possession. It then alleges that "John A. Hurlburt and Thomas L. Evans each claim the title to said lands respectively in fee simple, and your orator concedes that they were severally purchased and granted from the said Oregon and California Railroad Company in good faith for value, relying on the apparent title to said lands under said patent from orator to said railroad company, and without actual notice of any defect in the title of said company to said lands, as set forth in this bill. But your orator insists that they were chargeable with constructive notice of the several acts of Congress, and that under the said acts of Congress and the acts and doings of the said railroad company no title could pass to said Hurlburt and Evans, and that said patent should be cancelled as to them as well as to the grantee therein, the said Oregon and California Railroad Company."

In view of these facts, if the case depended alone on the act of July 25, 1866, the title of the defendants to these lands, as against the United States, could not be questioned.

The Government, however, has insisted in its bill that the

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issuing of the patents to the Oregon and California Railroad Company was without authority of law. This contention rests upon the assumption that the lands so patented — although within the limits of the grant contained in the act of July 25, 1866, and within the line of the Oregon Company as definitely located — were excluded from that grant because included in the grant previously made to the Northern Pacific Railroad Company by the act of July 2, 1864, c. 217, 13 Stat. 365; in which case, it is insisted that they were forfeited to the United States by the act of September 29, 1890, c. 1040, 26 Stat. 496, and should be so adjudged.

By the last-named act it was among other things provided: "§ 1. That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; *Provided*, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted." "§ 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared to the benefit of the completed line." 26 Stat. 496, c. 1040.

The contention of the Government renders it necessary to

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ascertain what interest, if any, was acquired by the Northern Pacific Railroad Company in these lands by virtue of the act of July 2, 1864.

By that act the Northern Pacific Railroad Company was created a corporation with authority to build a railroad and telegraph line from a point on Lake Superior in Wisconsin or Minnesota westerly by the most eligible route, as should be determined by the company, on a line north of the 45th degree of latitude, to some point on Puget's Sound, "with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus." The grant to that company was of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, *not reserved, sold, granted or otherwise appropriated*, and free from preëmption, or other claims or rights, *at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office*; and whenever, *prior to said time*, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

By other sections of the act it was provided: "§ 6. That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the *general route* shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preëmption before or after they are surveyed,

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except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale." "§ 8. That each and every grant, right and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six." By section twenty it was declared that "Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act." 13 Stat. 365, c. 217.

On the 6th day of March, 1865, Josiah Perham, President of the Northern Pacific Railroad Company addressed to Mr. Usher, then Secretary of the Interior, the following communication: "Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia River, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company

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may be marked and withdrawn from sale in conformity to law."

Under date of March 9, 1865, Secretary Usher wrote to the Commissioner of the General Land Office as follows: "Here-with I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from the market. In view of the provisions of the third and sixth sections of the act of Congress, approved July 2, 1864, should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the Territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the sixth section of said act of Congress."

No immediate reply seems to have been made to the letter of Secretary Usher. But on June 22, 1865, Mr. Wilson, Commissioner of the General Land Office, addressed to Mr. Harlan, then Secretary of the Interior, a communication in which he referred to the above letter of Secretary Usher, and in which he assigned many reasons why the Perham map was wholly inadequate for the purposes intended to be accomplished by it, namely, the withdrawal for the benefit of the Northern Pacific Railroad Company of all the public lands within the exterior lines indicated by that map. Among other things Mr. Wilson said in his communication: "Of course, no withdrawal can now be made on account of the road in the region of country extending across that part of the continent between the west boundary of Minnesota to the eastern surveys of Washington Territory, because over that territory the lines of the public surveys have not yet been established. In this extended locality the withdrawal should only be ordered as the public surveys are advanced and survey

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of railroad established, in like manner as indicated under first head. A general withdrawal upon conjectural or uncertain basis might result in shutting out from settlement large bodies of land which an actual survey would show not within the grant, whilst lands would be omitted from the withdrawals which the survey might require to be included. Then, it is not sound policy nor is there any warrant in our land legislation for doing any act the tendency of which would give preference to satisfy a grant on such a stupendous scale as this, whilst individual claims under our general system of land laws, homestead, preëmption and sales would be unaided by any such preliminary discriminating proceeding. The result of a premature withdrawal on uncertain basis would be unjust to the pioneer settler, detrimental to the public interests in arresting the progress of settlement and disposal in that direction of the public domain, and to that extent checking the growth and prosperity of our frontier, and that, too, in the vicinity of a colonial dependence of a powerful nation; would be a prejudice to the interests of the railroad grant itself in excluding settlers and immigrants, whose labor and means would enhance the value of such lands as in the ordinary progressive operations of the land system would in due time fall to the grant. The land system should be so administered that all the different acts of land legislation may be at the same time in full operation, giving precedence to no one law over another, unless where the terms of the law indicate the public will to be otherwise, leaving corporate or other grantees and individuals respectively to have the benefit of their superior diligence in establishing and completing their several claims according to law. For these considerations this office declines ordering a withdrawal until authenticated maps of the actual survey of the several portions of the route shall be successively filed from time to time to completion, showing the connection of said portions with the lines of the public surveys, yet respectfully submits the foregoing considerations for such directions as the Secretary may be pleased to give in the premises for the government of this office."

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On the 10th day of April, 1869, Congress passed a joint resolution granting a right of way for the construction of a railroad from a point at or near Portland, Oregon, to a point west of the Cascade Mountains in Washington Territory. That resolution provided: "That the Northern Pacific Railroad Company be, and hereby is, authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: *Provided*, That said company shall not be entitled to any subsidy in money, bonds or additional lands of the United States, in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: *And provided further*, That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed." 16 Stat. 57. No action was taken under that resolution because it contained no grant of lands; and it is not contended that it has any material bearing on this case. It is referred to merely as part of the history of the grant to the Northern Pacific Railroad.

After the map of the definite location of the Oregon Company had been filed and accepted, namely, on the 31st of May, 1870, Congress passed a joint resolution authorizing the Northern Pacific Railroad Company to issue bonds to aid in the construction and equipment of its road, "and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchise as a corporation; . . . and also to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main

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road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preëmpted or otherwise disposed of subsequent to the passage of the act of July 2, 1864. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points." 16 Stat. 378. As said by Mr. Justice Lamar, when Secretary of the Interior: "By this resolution the designation of the lines of the road was changed; that which by the granting act [July 2, 1864] was known as the branch line (via the valley of the Columbia River to a point at or near Portland, in the State of Oregon,) was changed to main road or main line, and that which had been designated as main line (crossing the Cascade Mountains to Puget Sound) was changed to branch line." 6 L. D. 400; *United States v. Northern Pacific Railroad Co.*, 152 U. S. 284, 299.

On the 4th day of August, 1870, two maps, constituting a map of general route of the Northern Pacific Railroad Company, were presented to the Secretary of the Interior. The bill alleged that those maps designated a route following the

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Columbia River from Wallula, Washington Territory, to a point on the north side of that river opposite Portland, Oregon, and that the Secretary of the Interior on the 13th day of August, 1870, in due form accepted them and directed the withdrawal of lands opposite that line. Withdrawals were accordingly made August 13, 1870, and October 27, 1870, and they embraced the lands here in controversy. The bill referred to these maps as maps of "general route," but in an amended bill the Government reserved the right to insist, if it should be thereafter advised to do so, that the map filed August 4, 1870, and the one filed March 6, 1865, "were maps of definite location of said Northern Pacific Railroad of its line from Wallula Junction to Portland, Oregon."

There never was any withdrawal of indemnity lands on the proposed line between Wallula and Portland, nor any *definite location or construction* of the road of the Northern Pacific Railroad Company *opposite to the lands in suit*.

Proceeding to the consideration of the case upon its merits, we observe that many questions of difficulty and importance have been discussed by learned counsel both at the bar and in their printed arguments which we do not deem it necessary to determine. In our judgment, the case is within a very narrow compass.

What was the extent of the grant of public lands made to the Northern Pacific Railroad Company by the act of July 2, 1864? That grant did not embrace all the odd-numbered sections within the exterior lines of any general route that might have been adopted by the company, nor all within the forty miles in width that might have been surveyed under the order of the President (§ 6) on each side of the entire line of the road after such general route had been designated. It was in the nature of a "float," no right or title to any particular section becoming certain until a definite location of route. *Missouri, Kansas & Texas Railway v. Kansas Pac. Railway*, 97 U. S. 491; *Grinnell v. Railroad Co.*, 103 U. S. 739, 742; *Van Wyck v. Knerals*, 106 U. S. 360, 366; *Kansas Pacific Railway v. Dunmeyer*, 113 U. S. 629, 634; *Wisconsin Central Railroad v. Price County*, 133 U. S. 496; *Deseret*

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Salt Co. v. Tarpey, 142 U. S. 241; *Sioux City Land Co. v. Griffey*, 143 U. S. 32, 38; *United States v. Southern Pacific Railroad*, 146 U. S. 570, 594; *Menotti v. Dillon*, 167 U. S. 703, 719; *Southern Pacific Railroad v. United States*, 168 U. S. 1.

In *Buttz v. Northern Pacific Railroad*, 119 U. S. 55, 71, 72, this court, speaking by Mr. Justice Field, referred to the act of 1864 and said that it contemplated "the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the *definite location* of the line of its road, and *limits* the grant to such alternate odd sections as have not, *at that time*, been reserved, sold, granted or otherwise appropriated, and free from preëmption, grant or other claims or rights. . . . Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant *operative only* upon such odd sections as have *not* been reserved, sold, granted or otherwise appropriated, and to which preëmption and other rights and claims have not attached, *when a map of the definite location has been filed.*"

In *United States v. Northern Pacific Railroad Company*, 152 U. S. 284, 296, it was held that "the act of 1864 granted to the Northern Pacific Railroad Company *only* public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights *at the time* its line of road was *definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office." Subsequently in *Northern Pacific Railroad v. Sanders*, 166 U. S. 620, 629, it was said that "the act of July 2, 1864, under which the railroad company claims title *excluded* from the grant made by it all lands that were *not, at the time the line of the road was definitely fixed*, free from preëmption or other claims or rights."

If therefore the Perham map of 1865 were conceded for the purposes of the present discussion to have been sufficient as a map of "general route"—and nothing more can possibly be claimed for it—these lands could not be regarded as hav-

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ing been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line.

There are some general expressions in *Buttz v. Northern Pacific Railroad*, above cited, which, counsel insists, indicate a different view. In that case Mr. Justice Field said that when the general route of the Northern Pacific Railroad was fixed and information thereof given to the Land Department by filing the map of such route, "*the law withdraws from sale or preëmption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted.*" This language was too broad if it is construed to express the thought that public lands, when within the exterior lines of a "general route," are "appropriated" from the time the map of such route is filed, so as to prevent them from being granted by Congress to and from being earned by another railroad corporation prior to the filing of a map of definite location by the company designating such general route. In *Northern Pacific Railroad v. Sanders*, 166 U. S. 620, 634, 635, 636, this court, referring to the act of July 2, 1864, said: "The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper. Provision for indemnification of the company in such an emergency was made by a clause in the act of 1864, providing that wherever, prior to the date of definite location, 'any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted or otherwise disposed of, other lands shall

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be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of such alternate sections.' 13 Stat. 368. Hence it was said in *Barden v. Northern Pacific Railroad Company*, 154 U.S. 288, 320, in which case the act of 1864 was construed, that the privilege of exploring for mineral lands was in full force at the time of the location of the definite lines of the road, and was a right reserved and excepted out of the grant at that time." In the same case it was also observed: "Much was said at the bar as to the decision of this court in *Buttz v. Northern Pacific Railroad*, 119 U. S. 55. On one side it is said that that case construes the sixth section of the act of 1864 as excluding the possibility of *any* right being acquired adversely to the railroad company to an odd-numbered section embraced by the exterior lines of the general route after that route had been established. On the other side it is contended that the only point necessary to be determined and the only one judicially determined in that case was that the defendant could not initiate a preëmption right to the land there in dispute so long as the Indian title referred to in the opinion was unextinguished. Without stopping to examine these contentions, it is sufficient to say that the *Buttz case* involved no inquiry as to the respective rights of the railroad company under the act of 1864 and of parties making applications in due form prior to the definite location of its road to purchase lands as mineral lands that were within the exterior lines of its general route. Mr. Justice Field delivered the opinion in the *Buttz case*, and, speaking for the court in *Barden v. Northern Pacific Railroad Company*, above cited, stated that the grant in that act excepted the privilege of exploring for mineral lands. For the reasons stated we adjudge that the lands in question were excluded from the grant of 1864 by reason of the pendency of record, at the time of the definite location of the plaintiff's road, of application to purchase them as mineral lands, such applications being in the form prescribed by the acts of Congress that related to such lands, and undetermined when the company filed its map of definite location."

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We take it then to be indisputable that even if the Perham map of 1865 were regarded as a sufficient map of the "general route" of the Northern Pacific Railroad, and not, to use the language of Judge Ross in this case, a mere sketch or diagram unauthenticated by any engineer or officer charged with the duty of designating such a route, nothing stood in the way of Congress granting to another railroad company any lands within the exterior lines of that route, by a statute passed after such map was filed in the Land Department and before a definite location of the Northern Pacific Railroad. Such a statute was that of July 25, 1866, granting lands to aid in the construction of a railroad from the Central Pacific Railroad in California to Portland, Oregon. That the lands here in dispute — even if within the general route of the Northern Pacific Railroad as defined by the Perham map of 1865 — are within the exterior limits of the grant to the Oregon Company contained in the subsequent act of 1866, is expressly averred in the bill filed by the United States.

Upon the question whether it was within the power of Congress to have granted to the Oregon Company in 1866 lands embraced within the exterior lines of the general route as defined by the Perham map of 1865, reference need only be made to *United States v. Union Pacific Railway*, 160 U. S. 1, 33, and *Menotti v. Dillon*, 167 U. S. 703, 719-720.

In *Menotti v. Dillon*, the principal question was as to the rights acquired by a railroad company in virtue of its having filed its map of general route and the withdrawal by executive order of certain lands within the exterior lines of that route from preëmption, private entry and sale — all before the passage of a subsequent act under which one of the parties claimed title to the land in dispute, the other claiming under the railroad company. This court said: "It is said that the railroad company filed its map of general route on the 8th of December, 1864, and that these lands having been withdrawn from preëmption, private entry and sale by the executive order of January 30, 1865, they were not embraced by the act of 1866. In our opinion this is not a proper interpretation of that act. The proviso of the first section distinctly indicates

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certain cases to which the act should not apply; and, distinctly excluding those cases, but no others, from its operation, the act, in express words, confirmed to the State, 'in all cases,' lands which the State had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws. No exception is made of lands which, at the date of the passage of the act, were withdrawn from preëmption, private entry and sale pursuant to the filing by the railroad company of its map of *general* route. And the court should not construe the act as excluding lands in that condition, unless it is prepared to hold that Congress had no power to confirm to the State lands which, at the time, were simply withdrawn from preëmption, private entry or sale for railroad purposes. We cannot so adjudge. The withdrawal order of January 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that of 1866; first, because the acts of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd-numbered sections, or any of them, within certain limits on each side of the road, at any time prior to the definite location of the line of the railroad; second, Congress reserved the power to alter, amend or repeal each act; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands in aid of the construction of a railroad is, until its route is established, in the nature of a 'float,' and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed. The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated. *Kansas Pacific Railway v. Dunmeyer*, 113 U. S. 629, 639, 644; *United States v. Southern Pacific Railroad*, 146 U. S. 570, 593. In *Northern Pacific Railroad v. Sanders*, 166 U. S. 620, 634, we said: 'The company acquired, by fixing its general route, only an inchoate right to the odd-

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numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located, and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper.'"

Again in the same case: "It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry and sale lands within the general route of a railroad is to preserve the lands unincumbered until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines, '*not* sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed,' the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation at any time prior to the definite location of the road, from selling, reserving or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company. Especially must this be true where the grant is made subject to the reserved power of Congress to add to, alter, amend or repeal the act containing such grant. The act of 1866 did not take from the railroad company any lands to which it had then acquired an absolute right. The right it acquired in virtue of the act making the grant and of the accepted map of its general route was to earn such of the lands within the exterior lines of that route as were *not* sold, reserved or disposed of, or to which no preëmption or homestead claim had attached, at the time of the definite location of its road. The act did not violate any contract between the United States and the railroad company, for the reason that the contract itself recognized the right of Congress, at any time before the line of road was definitely located, to dispose of odd-numbered sections granted. It was one that disposed of the lands in question before the definite location of the road. It dedicated these and like lands, part of the public domain, to the specific purposes stated in its provisions, and to

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that extent removed the restrictions created by the withdrawal order of 1865, leaving that order in full force as to other lands embraced by it. *Bullard v. Des Moines & Fort Dodge Railroad*, 122 U. S. 167, 174. That order took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road. We cannot doubt that the act of 1866 was a legal exertion of the power of Congress over the public domain."

As the grant contained in the act of July 2, 1864, did not include any lands that had been reserved, sold, granted or otherwise appropriated at the time the line of the Northern Pacific Railroad was "definitely fixed;" as the route of the Northern Pacific Railroad had not been definitely fixed at the time the act of July 25, 1866, was passed, or when the line of the Oregon Company was definitely located; as the lands in dispute are within the limits of the grant contained in the act of 1866; as the route of the Oregon Railroad was definitely fixed, at least when the map showing that route was accepted by the Secretary of the Interior on the 29th day of January, 1870—the Northern Pacific Railroad Company having done nothing prior to the latter date except to file the Perham map of 1865; and as prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there is no escape from the conclusion that these lands were lawfully earned by the Oregon Company and were rightly patented to it. Of course, if the route of the Northern Pacific road had been definitely located before the act of 1890 was passed, and had embraced the lands in dispute, different questions would have been presented.

In opposition to the views we have expressed it may be said that the clause in the act of July 25, 1866, providing for the selection under the direction of the Secretary of the Interior of lands for the Oregon Company in lieu of any that should "be found to have been granted, sold, reserved, occupied by

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homestead sellers, preëmpted or otherwise disposed of," shows that Congress did not intend to include in but intended to exclude from the grant to that company any lands that could have been earned by the Northern Pacific Railroad Company by definitely fixing its route and filing its map of definite location. Undoubtedly those lands would be regarded as having been appropriated when the route of the Oregon road was definitely located, if prior to that date the route of the Northern Pacific Railroad had been definitely fixed, and if such lands were within the exterior lines of that route. But, as we have said, these lands were within the limits of the grant of July 25, 1866, and had not, *at that time*, or when the route of the Oregon road was definitely located, been appropriated for the benefit of the Northern Pacific Railroad Company, for the reason that the latter company had not then filed any map of definite location. The Northern Pacific Railroad Company could take no lands except such as were unappropriated at the time its line was definitely fixed. It accepted the grant of 1864 subject to the possibility that Congress might, before its line was definitely fixed, authorize other railroad corporations to appropriate lands within its general route, allowing it to select other lands in lieu of any so appropriated. The lands here in dispute were consequently subject to be disposed of by Congress when the act of 1866 was passed; and (the line of the Northern Pacific Railroad not having been definitely located prior to the passage of the forfeiture act of 1890) the Oregon Company became entitled to take the lands and to receive patents therefor in virtue of its accepted map of definite location.

Touching the joint resolution of May 31, 1870, it is clear that whatever may be its scope, no previously vested right of the Oregon Company was affected or was intended to be affected by that resolution. On the contrary, the resolution on its face indicates that some of the lands which the Northern Pacific Railroad Company may have been entitled to earn had been or might have been granted or otherwise disposed of "subsequent to the passage of the act of July 2, 1864," and in lieu thereof that company was authorized under the direction

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of the Secretary of the Interior to receive other lands. The only effect therefore of the joint resolution, as between the Northern Pacific Railroad Company and the Oregon Company, was to confer upon the former company the right to receive other lands in lieu of those appropriated by the latter company under the authority of the act of 1866.

Passing by as unnecessary to be determined other questions discussed by counsel, we adjudge that the Circuit Court erred in cancelling the patents referred to in the bill, and that the reversal by the Circuit Court of Appeals of the decree of the Circuit Court and the remanding of the cause with directions to dismiss the bill was right.

The decree of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE McKENNA did not participate in the decision of this case.
